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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 119

O'NEAL MASSEY, PETITIONER,

vs.

H. E. MOORE, WARDEN, TEXAS STATE PENITENTIARY AT HUNTSVILLE, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1953

CERTIORARI GRANTED JUNE 7, 1954

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INDEX

	Original	Print
Record from the U.S.D.C. for the Southern District of Texas, Houston Division	1	1
Caption (omitted in printing)	1	
Petition for writ of habeas corpus	2	1
Memorandum and order dated July 28, 1952 granting State of Texas and petitioner Massey until September 15, 1952 to file copies of proceedings, etc.	3	2
Petitioner's application for order requiring Clerk of State Court to deliver copies of record in that court to him	6	4
Memorandum and order of Court with respect to Massey's application for order requiring Clerk of State Court to deliver to him copies of record in that Court	8	5
Certified copy of respondent's answer filed in State Court	9	6
Exhibit A—Findings of fact and conclusions of law prepared and filed by the trial judge dated June 29, 1948	19	12
Exhibit B—Memorandum and order dated January 9, 1952 declining either to award the writ of habeas corpus or to enter a show cause order	27	20
Exhibit C—Order denying petition for writ of habeas corpus	29	21
Exhibit D—Memorandum and order denying petitioner's motion for rehearing	30	22
Exhibit E—Supplementary order denying petition for rehearing (omitted in printing)	32	
Certified copy of opinion of Court of Criminal Appeals of Texas, Davidson, J.	34	23

Record from the U.S.D.C. for the Southern District of Texas, Houston Division—Continued	Original	Print
Certified copy of Statement of Facts in Court of Criminal Appeals of Texas	40	27
Testimony of H. E. Moore (omitted in printing)	44	
Testimony of L. B. Tindall (omitted in printing)	47	
Testimony of Albert Massey (omitted in printing)	49	
Testimony of Eugene Padgett (omitted in printing)	51	
Testimony of Virgil Killison (omitted in printing)	55	
Testimony of Grady Huffman (omitted in printing)	55	
Testimony of Doctor M. E. Curtis	59	27
Testimony of Joe Byrd	62	28
Affidavit of T. W. Arnold	71	36
Testimony of Roland Tyler (omitted in printing)	72	
Testimony of J. C. Hogue	79	37
Judgment and sentence of the Ninth District Court of San Jacinto County (omitted in printing)	84	
Indictment returned by the Grand Jurors of San Jacinto County	87	41
Affidavit of W. B. Browder dated April 1, 1952	95	42
Affidavit of W. C. McClain dated April 1, 1952	96	43
Memorandum and order declining either to award writ of habeas corpus or issue an order to show cause dated October 7, 1952	99	44
Motion for rehearing	101	45
Memorandum and order denying petition for rehearing	102	46
Motion for certificate of probable cause and to be allowed to appeal as a poor person (omitted in printing)	103	
Memorandum and order allowing petition to appeal but declining to issue a certificate of probable cause (omitted in printing)	104	
Notice of appeal (omitted in printing)	105	
Specification of record (omitted in printing)	106	
Clerk's certificate (omitted in printing)	107	
Proceedings in U. S. C. A. for the Fifth Circuit	108/09	45-46
Motion to dismiss (omitted in printing)	109	
Answer to motion to dismiss (omitted in printing)	111	
Argument and submission (omitted in printing)	116	
Opinion, Hutcheson, J.	117	46
Dissenting opinion, Rives, J.	126	51
Judgment	144	62
Motion for rehearing (omitted in printing)	145	
Supplement to motion for rehearing (omitted in printing)	153	62
Order denying rehearing	154	62
Clerk's certificate (omitted in printing)	155	
Order granting certiorari	156	62

1-2 In United States District Court
For the Southern District of Texas

PETITION OF O'NEAL MASSEY FOR WRIT OF HABEAS CORPUS
—Filed July 28, 1952

in re O'NEAL MASSEY

To the Honorable Judge of Said Court:

Comes now O'Neal Massey and moves for leave to file application for Writ of Habeas Corpus and prays for the indulgence of the Court for the following reasons to-wit:

That Petitioner is illegally and unlawfully restrained of his liberty at the State Penitentiary, Huntsville, Texas in violation of the Constitution of the United States by virtue of a Judgment of Conviction of the District Court of San Jacinto Co. Texas entered on March 11, 1941 finding Petitioner Guilty of the offense of robbery.

Petitioner can show that the San Jacinto County Judgment deprives Petitioner of his liberty without due process of law in violation of the 14th amendment to the Constitution of the United States in that the San Jacinto County Court was without "jurisdiction" of the offense charged. That such Judgment is therefore void and Petitioner is entitled to the writ of habeas corpus; Powell v. Ala. 287 U. S. 45; Bowen v. Johnson 307 U. S. 19; Ex parte Neilson 131 U. S. 176; Moore v. Dempsey 261 U. S. 86; Johnson v. Zerbst 304 U. S. 458.

Petitioner will show that he has exhausted State rights on the question of "jurisdiction" of the trial court to enter its judgment of March 11, 1941; that in 1943 he raised the question of the Court's jurisdiction before the trial court by petition for writ of habeas corpus; that in the same petition he raised the question of insanity; that this court held in CA No. 2380 in 1948 that said 1943 petition exhausted State rights on the question of insanity; therefore Petitioner claims that State rights on the question of jurisdiction are also exhausted because it was presented to the Court in the same 1943 Petition.

Wherefore, he moves for leave to file Petition for Writ of Habeas Corpus based *in* the 14th amendment and raising the question of the San Jacinto County Court's lack of jurisdiction to proceed to judgment on March 11, 1941.

O'NEAL MASSEY,
Box 32, Huntsville, Texas.

3 In United States District Court

MEMORANDUM AND ORDER OF COURT THAT STATE OF TEXAS AND PETITIONER MASSEY HAVE UNTIL SEPT. 15, 1952, TO FILE COPIES OF PROCEEDINGS, ETC. WITH RESPECT TO MASSEY'S RECENT PETITION TO STATE COURT FOR RELIEF—Filed July 28, 1952

On July 14, 1952, I received through the mail from O'Neal Massey, an inmate of the State Penitentiary, his Petition for the Writ of Habeas Corpus. It seems proper to briefly review former proceedings in this Court in this matter.

In 1948 Petitioner's Petition for the Writ of Habeas Corpus was fully heard by this Court, and the Petition denied. This was affirmed by the Court of Appeals on May 9, 1949. See 173 Fed. (2d) 980. I regarded this as a final determination by this Court and the Court of Appeals of Massey's right to have the Writ of Habeas Corpus issued and of all questions pertaining thereto, except this:

Such proceedings were had on the theory that Massey had been represented by counsel at his trial, but after such affirmance by the Court of Appeals, it developed that he had *not* been represented by counsel. Therefore, in my Memorandum and Order of January 18, 1952, I said:

> "The Certificate of the Trial Judge at the trial of March 11, 1941 mentioned in my Memorandum of January 9, 1952, which is admissible under Section 2245, Title 28, U. S. Code, Judiciary and Judicial Procedure, is dated September 16, 1950. This Certificate as stated, shows that the Record of the Judgment of the Court, etc. is not correct, and that Massey was not represented by counsel at such trial. Since September 16, 1950, therefore, there has been a *new* question of whether under the authorities Massey had a trial in accordance with the Federal Constitution. Neither in his Petition for the Writ of Habeas Corpus nor in his Motion for Rehearing does Massey make any showing that as to that question he has exhausted the remedies available to him in the Courts of Texas. The question may have incidentally been referred to in some of the many proceedings in the State Courts, but always it was disposed of in the light of Massey's sentence showing that
> 4 he was represented by counsel."

I then held that Massey should present his Petition for the Writ of Habeas Corpus to a State Court of competent jurisdiction, and denied him relief here. See Order of January 18, 1952.

On January 25, 1952, I denied Massey's Motion for Rehearing. See Order.

On February 6, 1952, I allowed Massey to withdraw the Exhibits

which had been filed with the Clerk of the Court in his case. See Order.

On June 11, 1952, I denied his Motion to Reinstate the proceedings in his case. See Order.

On June 13, 1952, I denied his Motion for Rehearing on the question of reinstating the proceedings in his case. See Order.

The present Petition must I think be regarded as a *new* proceeding, but one in which I should consider only one question, and that is the question of Massey's not having had counsel at his trial. My understanding is that he presented his Petition for the Writ of Habeas Corpus, based upon the fact that he did not have counsel, to the State Court, and that his Petition has been denied. Therefore, the present Petition for the Writ of Habeas Corpus is given the following direction:

(1) The Clerk will retain same on file and will furnish the Attorney General of Texas with a copy thereof.

(2) The State of Texas and the Petitioner Massey shall have until September 15, 1952, to file copies of proceedings, decisions, etc. with respect to his recent Petition to the State Court for relief. No copies of prior proceedings need be filed.

(3) On or after September 15, 1952, when said matters have been filed with the Clerk, the Court will consider whether the Writ of Habeas Corpus should be issued or Order to Show Cause entered, but such consideration will be confined to the one question of the effect of his trial without counsel, and whether he has exhausted his remedies on that question in the State Court.

The Clerk will record this Memorandum and Order on the Minutes of the Court and will furnish Massey and the Attorney
5 General of Texas each with a copy.

Done at Houston, Texas, this July 28, 1952.

T. M. KENNERLY,
Judge.

6 In United States District Court

PETITIONER'S APPLICATION FOR ORDER REQUIRING CLERK OF STATE COURT TO DELIVER COPIES OF RECORD IN THAT COURT TO HIM—Filed Sept. 9 1952

To the Honorable Judge of Said Court:

Comes now O'Neal Massey, Petitioner in the above entitled and numbered cause and moves and prays the Court as follows:

On July 28, 1952, the Court entered an Order in this case in which the Court said:

"The State of Texas and Petitioner Massey shall have until September 15, 1952 to file copies of proceedings decisions, etc.; with respect to his recent petition to the State Court for relief."

Petitioner respectfully submits that following the hearing in the District Court of Walker County, Texas, on April 4, 1952, the Honorable Max Rogers, Judge of said court ordered its Clerk and Court Reporter to give Petitioner a full copy of the Record.

That said Clerk and Reporter failed to do so. That Petitioner has written numerous letters to the Judge, Clerk and Reporter of the Walker County Court requesting a copy of said Record and all of said letters went unanswered. *Please see Petitioner's Motion which was denied by this Court on July 13, 1952.*

That Petitioner has applied to the Walker County Court for a copy of the Record under Title 28 U. S. Code Section 224, which gives Petitioner the right to copies of said Record by filing a Pauper's Oath but that such application has gone unanswered.

That the production of said record is highly important to Petitioner because same shows his critical need for Counsel at his trial of March 11, 1941 in that such Record shows a mass of *new* evidence which was not before this Court in 1948 showing that:

7 (1) Petitioner was of unsound mind when convicted in 1941 without Counsel.

(2) Not one bit of evidence was entered by the State as to Petitioner's guilt.

(3) That the only State witness at Petitioner's trial in 1941 could not say that Petitioner robbed him.

(4) That the Court had no jurisdiction of the offense charged.

Petitioner does not have the funds to pay for a copy of said Record.

Wherefore, Petitioner moves and prays the Court under Title 28, U. S. Code Section 224 to issue *and* Order directed to Mr. L. B. Tindall, Clerk of the District Court of Walker County, Texas, Huntsville, Texas and to Mr. Robert Burns, Court Reporter for

the District Court of Walker County, Texas, Huntsville, Texas, ordering them to give Petitioner a copy of the April 4, 1952 Habeas Corpus Proceedings and Petitioner will ever pray.

STATE OF TEXAS,
County of Walker:

O'Neal Massey being duly sworn according to law deposes and states on oath:

That he is a citizen of the United States. That he is without funds property or income. That because of his poverty he is unable to pay for a copy of the Record in the April 4, 1952 Walker County Habeas Corpus proceeding.

(S.) O'NEAL MASSEY.

[SEAL.]

Sworn to and subscribed before me this 8th day of August, 1952.

(S.) WILFORD BURDEAUX,
Notary Public in and for Walker County, Texas.

8 IN UNITED STATES DISTRICT COURT

MEMORANDUM AND ORDER OF COURT WITH RESPECT TO MASSEY'S APPLICATION FOR ORDER REQUIRING CLERK OF STATE COURT TO DELIVER TO HIM COPIES OF RECORD IN THAT COURT—Filed September 9, 1952.

This case is pending under Order entered July 28, 1952, to which reference is made. The parties have been allowed until September 15, 1952, to file copies of proceedings, decisions, etc. with respect to recent Petition in the State Court.

I am now presented by Mr. O'Neal Massey with an Application for an Order to require the Clerk or Clerks of the State Court to deliver to him copies of the record in that Court. I am without authority to do so.

I am assuming, however, that copies of such papers will be filed in this case by the State of Texas.

The Clerk will record this Memorandum and Order on the Minutes of the Court and will retain Massey's Application on file, and will furnish Massey and the Attorney General of Texas each with a copy of this Order.

Done at Houston, Texas, this September 9, 1952.

(S.) T. M. KENNERLY,
Judge.

9 IN UNITED STATES DISTRICT COURT

CERTIFIED COPY OF RESPONDENT'S ANSWER FILED IN STATE COURT—Filed September 11, 1952.

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now H. E. Moore, Warden of the Texas State Penitentiary at Huntsville, Texas, and in answer to the application of O'Neal Massey for the writ of habeas corpus heretofore filed in this cause, moves that said application be denied and that petitioner be denied any and all relief sought therein for the following reasons, to-wit:

I

That the petitioner, O'Neal Massey, is held in custody under a judgment of the District Court of San Jacinto County, Texas, Ninth Judicial District of Texas, finding him guilty of the offense of robbery by assault and further finding that the said petitioner had theretofore been duly tried and convicted of a felony in Cause No. 42,628, in the Criminal District Court of Harris County, Texas, on the 12th day of November, 1936, and further that he had been theretofore tried and convicted of a felony in the Criminal Court of Harris County, Texas, on the 20th day of January, 1939, and that the said O'Neal Massey be punished by confinement in the State Penitentiary. Petitioner was sentenced by the court to be confined in the State Penitentiary for the balance of his natural life. The aforesaid judgment and sentence were entered of record in the minutes of the District Court of San Jacinto County, Texas, on March 11, 1941, and thereafter the petitioner was committed to the State Penitentiary pursuant to such judgment and sentence.

10 In this connection respondent would show that the indictment upon which petitioner was tried in the District Court of San Jacinto County as aforesaid was docketed in said court as Cause No. 5070 and a copy of such indictment, as provided by law, was duly served upon petitioner on March 7, 1941, on which latter date capias was served on the said O'Neal Massey and, pursuant to bench warrant duly issued out of the District Court of San Jacinto County, petitioner was on said date removed from the State Penitentiary at Huntsville to the County Jail of San Jacinto County, Texas, to stand trial upon the aforesaid indictment. Petitioner was tried, found guilty, and sentenced, all as hereinabove set out, and no appeal was taken by petitioner from such judgment of conviction.

II

On or about the 22nd day of March 1943 the petitioner, by and through his attorney, presented his application for a writ of habeas corpus to the Judge of the District Court of San Jacinto County,

which said application was granted and made returnable to the District Court of Montgomery County, Texas, there to be heard and determined. In such application for writ of ha' as corpus the petitioner alleged that "the relator was without counsel at the time of his trial and was insane; that he was ignorant of his legal rights and interposed no defense whatever, as the record reflects, and that the defendant is still insane."

On or about the 27th day of March 1943, petitioner, through his attorney, filed an amended application for the writ of habeas corpus in which he alleged that "at the time of his trial relator was insane and that he is still insane; that his insanity is such that he cannot distinguish right from wrong."

Thereafter, on April 3, 1943, petitioner's said applications came on to be heard in the District Court of Montgomery County, Ninth Judicial District of Texas, at which hearing the petitioner appeared in person and by attorney. After such hearing, the Judge
II of the Ninth Judicial District Court of Montgomery County entered his order dismissing petitioner's application for the writ of habeas corpus. The petitioner duly excepted to the judgment of the Court and gave notice of appeal to the Court of Criminal Appeals of Texas, but no such appeal was ever perfected.

III

Thereafter, at its May term, 1945, the petitioner filed in the District Court of Walker County, Texas, Twelfth Judicial District, his application for the writ of habeas corpus complaining that he was being unlawfully restrained of his liberty by being confined in the State Penitentiary under the judgment and sentence imposed by the District Court of San Jacinto County, Texas, as aforesaid. On July 19, 1945, the Honorable Max M. Rogers, Judge of the Twelfth Judicial District of Texas entered his order granting the writ of habeas corpus and making the same returnable to the Ninth Judicial District Court of San Jacinto County, Texas.

In such application for writ of habeas corpus filed in the District Court of Walker County, petitioner did not raise the question of his insanity nor did he raise the question of his lack of counsel. However, after being informed of the order of the District Court of Walker County granting said writ and making it returnable to San Jacinto County, petitioner filed in the District Court of Walker County an instrument which he styled "Motion to Disqualify Judge" asking that said writ not be made returnable to said San Jacinto County, alleging that at the time he was tried in San Jacinto County on March 11, 1941, the Judge of the District Court of San Jacinto County was "properly informed that relator was being placed on trial in said cause in an insane state of mind,

without benefit of counsel. That through prejudice of the presiding judge, Hon. W. B. Browder, the trial was ordered to proceed without recognizing the insane condition of the relator, and
12 through prejudice, said Judge, Hon. W. B. Browder, refused to appoint counsel for relator, therefore depriving the relator of his constitutional rights."

Thereafter, on or about July 26, 1945, a full and complete hearing was had in the District Court of San Jacinto County upon petitioner's application for the writ of habeas corpus, as well as upon the motion of the State of Texas to enter judgment nunc pro tunc in Cause No. 5070, same being the cause in which O'Neal Massey was sentenced to life imprisonment on or about March 11, 1941. At such hearing the petitioner, O'Neal Massey, was present in court and actively participated in the proceeding by examining and cross-examining witnesses and by offering documentary evidence.

After such hearing judgment nunc pro tunc was entered, providing that petitioner be punished by confinement in the State Penitentiary for life, and the petitioner was remanded to the State Penitentiary to serve such sentence. From the order of the court in this regard the petitioner duly perfected his appeal to the Court of Criminal Appeals of Texas, where, on January 9, 1943, the judgment of the District Court of San Jacinto County was affirmed, the Court of Criminal Appeals holding, among other things, that:

> "Appellant is not entitled to the relief sought in the habeas corpus proceeding, and he is hereby remanded to the warden of the Penitentiary of Texas."

The Court of Criminal Appeals had before it, as a part of the transcript of proceedings in the trial court, copies of the pleadings in the proceeding in Montgomery County described in paragraph II above, including copies of petitioner's application and amended application for the writ of habeas corpus, and the court's order dismissing same.

From the judgment of the Court of Criminal Appeals of Texas, petitioner applied to the Supreme Court of the United States for writ of error which was denied October 21, 1946. See *Massey v. Texas*, 329 U. S. 674, 67 Sup. Ct. 109, 91 L. Ed. 595 (No. 34, Misc., October Term, 1946).

13 IV

On or about April 23, 1945, Petitioner O'Neal Massey filed in the United States District Court for the Southern District of Texas, Houston Division, his petition for the writ of habeas corpus and said petition was ordered filed and was docketed as Civil Action No. 1711 in said court. In his petition the petitioner alleged that "he was not represented by counsel at said trial; that

under Amendment VI of the United States Constitution, this relator was entitled to counsel at said trial. That at the time of said trial this relator was insane, and that relator could not make a defense to said charge because of insanity; that said court deprived relator of his constitutional rights to make a defense to said charge by trying relator while he was suffering from insanity."

On September 29, 1945, petitioner's application for writ of habeas corpus came on to be heard in the United States District Court for the Southern District of Texas and his petition was denied for lack of jurisdiction.

V

On or about March 25, 1946, petitioner filed in the Supreme Court of the United States a motion for leave to file petition for the writ of habeas corpus and the same was given the Number 109 Misc., October Term, 1945. In his petition before the Supreme Court of the United States, petitioner alleged "the relator would further show that he was not represented by counsel in said trial. Relator would further show that at the time of trial, the relator was insane, and that relator could not offer his insanity as a defense to said charge, that by reason of his insanity, he was helpless to make a defense to said charge or to appeal said conviction."

On April 22, 1946, petitioner's said original application for writ of habeas corpus was denied by the Supreme Court of the United States. See *In the Matter of O'Neal Massey*, 327 U. S. 770.

14 Motion for leave to file petition for rehearing was denied October 21, 1946. See 329 U. S. 823.

VI

Some time between September 26 and December 4, 1946, petitioner filed in the Court of Criminal Appeals of Texas an original application for the writ of habeas corpus seeking his release from the Texas State Penitentiary. In said application it was alleged "that at his first trial on March 11, 1941, and also on the hearing on July 26, 1945, at which time the second judgment and sentence was rendered against him, the relator was unable to defend himself and that said court deprived him of the aid and assistance of counsel for defense, in violation of the due process of the law clause of the 14th Amendment of said Constitution. That he did not by word or action at either trial waive the assistance of counsel for his defense."

In denying petitioner's application for writ of habeas corpus The Court of Criminal Appeals, through its Presiding Judge, entered the following order:

"Application for writ of habeas corpus is refused. The same matters here presented were passed upon by this court in Ex

parte Massey, No. 23,212, reported in S. W. 2d series, at page 877, Vol. 191, this Decr. 4, 1946."

No appeal was prosecuted from such order of the Court of Criminal Appeals to the Supreme Court of the United States.

VII

On or about October 28, 1946, petitioner filed in the United States District Court for the Southern District of Texas, Houston Division, his application for the writ of habeas corpus. Said application was docketed in said Court as Civil Action No. 2380. On March 13, 1947, such application was denied, but, thereafter, on reconsideration the Court entered its order dated April 4, 1947, providing that show cause order be issued directing the warden of the State Penitentiary to show cause why the writ of habeas corpus should
15 not issue. After the filing of numerous other pleadings and the entry of certain other orders, the cause was finally set down for hearing on May 27, 1948, on which date the matter was tried before the Court. At such hearing Massey was represented by counsel appointed by the Court. On June 29, 1948, the United States District Judge filed his findings of fact and conclusions of law and on the same date denied the petition for writ of habeas corpus. An appeal was perfected by petitioner to the United States Court of Appeals for the Fifth Circuit, where the action of the trial court was affirmed on May 9, 1949. See *O'Neal Massey v. H. E. Moore*, 173 F. 2d 980. Rehearing was denied June 1, 1949. Petitioner applied to the Supreme Court of the United States for certiorari, which was denied October 10, 1949. See *Massey v. Moore*, 338 U. S. 837, 70 Supreme Court 46.

The findings of fact and conclusions of law filed by the United States District Judge in said cause are attached hereto as Exhibit "A."

VIII

In the month of October 1950 petitioner filed in the Court of Criminal Appeals of Texas his original application for the writ of habeas corpus. In such application petitioner alleged that at the time he was tried in the District Court of San Jacinto County on March 11, 1941, he was of unsound mind, that he was without funds to hire counsel, that he was without legal training, and that because of his insanity he knew nothing of the technical requirements "of the indictment or the instruments defining the elements of the crime, or the evidence required for conviction." Said petition was considered by the Court of Criminal Appeals and on or about January 24, 1951 the Court decided that the writ of habeas corpus should not

was taken from this order to the Supreme Court of the United States.

16

IX

In the month of January, 1952, petitioner applied to the United States District Court for the Southern District of Texas for the writ of habeas corpus. On January 9, 1952, the United States District Judge entered his memorandum and order declining to either award the writ of habeas corpus or to enter a show cause order and also entered his order denying petition for writ of habeas corpus. A copy of said memorandum and order is attached hereto as Exhibit "B" and a copy of the order denying the petition is attached hereto as Exhibit "C."

X

On January 18, 1952, the United States District Judge, sitting in the matter aforesaid, entered his order overruling Massey's petition for rehearing. A copy of such order is attached hereto as Exhibit "D."

XI

On January 25, 1952, the said United States District Judge entered another and supplementary order denying petition for rehearing in the matter aforesaid. A copy of such order is attached hereto as Exhibit "E."

XII

Respondent would further show that at the time petitioner was tried in the District Court of San Jacinto County on March 11, 1941, the petitioner was not indicted for a capital felony, that he was not eligible for a suspended sentence, and that he did not waive trial by jury. Respondent is informed and believes that there were no special or unusual circumstances brought to the attention of the court which would require the appointment of counsel. Therefore, under the laws of this State the court was not required to appoint counsel for petitioner.

In this connection, respondent further shows that he is informed and believes that at the time the said O'Neal Massey was

17 tried in San Jacinto County, one W. C. McClain, District Attorney of the Ninth Judicial District of Texas, caused petitioner to be brought before the court and stated in open court that if petitioner desired to plead guilty to the offense charged in the indictment the District Attorney would recommend to the Court that petitioner be given the minimum sentence for such offense, which is five years' confinement in the penitentiary. Petitioner refused to plead guilty and stated that he wished to plead not guilty

XIII

In view of all the above and foregoing, respondent would show that petitioner has time and again had his day in court and that due process has been accorded him in all respects.

WHEREFORE, respondent prays judgment that the petitioner's application for writ of habeas corpus be denied and that any and all relief asked in said application be likewise denied.

PRICE DANIEL,
Attorney General of Texas;
EDWIN N. BELL,
Assistant Attorney General;
(S.) WILLIS E. GRESHAM,
Assistant Attorney General;
WILLIAM T. BENNETT,
District Attorney,
Twelfth Judicial District,
Attorneys for Respondent,
Capitol Station, Austin, Texas.

18 *Duly sworn to by H. E. Moore. Jurat omitted in printing.*

19 EXHIBIT "A" TO RESPONDENT'S ANSWER

In the District Court of the United States for the Southern District of Texas, Houston Division

Civil Action No. 2380

In the Matter of the Petition of O'NEAL MASSEY for the Writ of Habeas Corpus

June 29, 1948

Findings of Fact and Conclusions of Law Prepared and Filed by the Trial Judge

Statement of the Case

This is a Petition by O'Neal Massey (hereinafter for brevity called Petitioner), an inmate of the Texas State Penitentiary and confined in a prison in this District and Division, for the Writ of Habeas Corpus.

On or about October 16, 1946, Petitioner presented to the Honorable Allen B. Hannay, one of the Judges of this Court, his Petition for such Writ, which Petition was by Order of Judge Hannay filed in this Court October 28, 1946. On February 11, 1947, Judge

Hannay dismissed Petition for lack of jurisdiction. Thereafter, Petitioner filed with his Petition other documents and data, and Judge Hannay reinstated the case, and on April 4, 1947, entered an Order, directing A. C. Turner, Warden of the Texas State Penitentiary, then a resident of this District and Division, to show cause why such Writ should not issue. Thereafter, on May 2, 1947, [p. 1] Respondent A. C. Turner, as Warden, filed his Response or Return, setting forth, among other matters, that Petitioner was held as an inmate of the Texas State Penitentiary under and by virtue of a conviction and sentence in the District Court of San Jacinto County, Texas, in Cause No. 5070, State of Texas v. O'Neal Massey, entered on March 11, 1941, and by virtue of a nunc pro tunc Order of said Court in said cause dated July 26, 1945. On May 29, 1947, Petitioner filed his Answer and Traverse to the Return of Respondent.

20 On May 7 1948, the case was assigned to me for hearing, and came on for a hearing on the merits on May 27, 1948.

Prior to the hearing, Petitioner requested that I appoint an Attorney to represent him, and I appointed Bernard A. Golding, Esq.; who represented him at the hearing.

Prior to the hearing (May 26, 1948) H. E. Moore, present Warden of the Texas State Penitentiary, who has since the institution of these proceedings succeeded A. C. Turner as Warden, filed his Amended Original Return. He is for brevity referred to as *Respondent*.

(a) On February 26, 1940, a Grand Jury returned into the Ninth Judicial District Court of San Jacinto County, Texas, in cause No. 5070, State of Texas v. O'Neal Massey, an Indictment charging that Petitioner on or about September 6, 1939, in San Jacinto County, Texas, did make an assault upon Dr. M. H. Curtis, and thereby by putting Curtis in fear of life and bodily injury, fraudulently and without the consent of said Curtis, take an automobile from [p. 2] the possession of Curtis, etc. It is also alleged that Petitioner had already on or about November 12, 1936, been legally and finally convicted in the Criminal District Court of Harris County, Texas, of an offense less than capital felony, and had already on or about January 20, 1939, been legally and finally convicted in such Criminal District Court of Harris County, of an offense less than capital felony. Such indictment was apparently drawn under Article 63 of the Texas Penal Code, reading as follows:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Petitioner was tried on such Indictment March 11, 1941. The records of such Court in such cause No. 5070 show that Petitioner

"*appeared in person in open Court, his counsel also being present,*" and pleaded not guilty. He was tried before a Jury, and the Verdict of the Jury as shown by the Record is as follows:

> "We, the Jury, find the Defendant, O'Neal Massey, guilty as charged in the indictment. We further find that he is the same person who was duly tried and convicted in the case of State of Texas vs. O'Neal Massey, No. 42,628, in the Criminal District Court of Harris County, Texas, on the 12th day of November A. D. 1936, for the offense of Felony Theft, and the conviction therein became final. We further find that
> 21 the said O'Neal Massey is the same person who was duly tried and convicted in the Criminal District Court of Harris County, Texas, on the 20th day of January, 1939, in the case of State of Texas vs. O'Neal Massey, No. 46,254, and that the conviction therein became final."

The sentence entered on the Court Record on such Verdict was confinement in the State Penitentiary "for a term of — years," i. e.; the sentence did not set forth the number of years Petitioner was to be confined in the penitentiary. I quote the sentence from the record: [p. 3]

> "IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, O'Neal Massey, is guilty of the offense of Robbery by Assault as found by the jury, and that he be punished by confinement in the State Penitentiary for a term of — years and that the State of Texas do have and recover of the said Defendant O'Neal Massey all costs in this prosecution expended, for which let execution issue."

In accordance with the two Harris County convictions, Petitioner for some time prior to such trial in San Jacinto County (March 11, 1941), had been confined in the Texas State Penitentiary. He claims that he was of unsound mind at the time of such San Jacinto County trial. The testimony of Joe Byrd, who was some time before and some time after March 11, 1941, Assistant Warden of the Texas State Penitentiary and who is now Chief Transfer Agent of such Penitentiary, is most significant. Respondent not only did not attempt to show that Byrd's tesimony was untrue, but did not cross examine him. The meager records produced from the psychopathic ward of the prison, where Petitioner was confined, tend to corroborate, rather than dispute, Byrd's testimony. It is clear that Petitioner was at times of unsound mind and was confined in the psychopathic ward of the penitentiary. He was taken from such psychopathic ward, delivered to the Sheriff of San Jacinto County, and carried before the San Jacinto County Court, and on March 11,

1941, tried and sentenced as stated above. After such trial and sentence, while in the San Jacinto County jail, he mutilated himself by cutting his wrists, and was in that condition when returned to the penitentiary, and to the psychopathic ward.

I find petitioner to have been at times and from time to time of unsound mind around March 11, 1941, the date of his trial
22 in the District Court [p. 4] of San Jacinto County, and for several months previous thereto, and several months subsequent thereto. What his condition was on the day and at the time of the trial is not clear. I think he is now sane, but rather queer.

(b) On or about March 22, 1943, complaining of his conviction on March 11, 1941, in San Jacinto County, Petitioner presented to Honorable E. T. Murphy, Judge of the District Court of Montgomery County, Texas, his Petition for the Writ of Habeas Corpus, in which he makes the following allegations:

> "Relator would further show your Honor that the District Court of San Jacinto County, Texas, was without jurisdiction of the offense charged in the indictment; that the venue was not properly laid for the reason that the offense, if any, did not occur in San Jacinto County. Relator would further show your Honor that the relator was without counsel at the time of his trial and was insane; that he was ignorant of his legal rights and interposed no defense whatever, as the record reflects, and that the defendant is still insane."

There was a similar allegation in his Amended Petition.

At the hearing before the District Judge of Montgomery County, who was also the District Judge of San Jacinto County, on such petition, it was dismissed on April 3, 1943. Petitioner gave notice of appeal to the Court of Criminal Appeals of Texas, but his appeal was not perfected. Such Order of Dismissal was as follows:

> "On this the 3rd day of April A.D. 1943, came on to be heard the application of O'Neal Massey, relator in the above entitled and numbered cause, for a writ of Habeas Corpus against A. C. Turner, Warden of State Penitentiary, Huntsville, Texas, and the said A. C. Turner having made due return of said writ, served upon him, and having produced before me the person of the said O'Neal Massey, and came relator in person and by attorney, and came respondent in person and by and through Jas. M. Crane, District Attorney of the 9th Judicial District of Texas, and after having read in the pleadings of both relator and respondent, the State of Texas and respondent by [p. 5] and through said District Attorney, did present and argue a motion to dismiss relator's application for writ of Habeas Corpus, on the grounds that

same was improperly brought, and that said application did not contain sufficient allegations for the relief prayed for therein and was therefore not entitled to any relief therein sought, and that same should be in all things dismissed and denied; and, the court, after having heard said motion to dismiss, and the arguments of counsel for relator and respondent, is of the opinion that relator's application for writ of habeas corpus should be dismissed for the reasons, to-wit: That the judgment and sentence of the 9th District Court of San Jacinto County, Texas, in cause Number 5070, styled State of Texas v. O'Neal Massey, has become final, and the defendant not having raised the questions of venue or
23 of insanity, as matters of defense, upon the trial of said cause, he has therefore waived the same, and said judgment and sentence is final against him, the said O'Neal Massey.

That on the question of sanity of the defendant, O'Neal Massey, after conviction, this proceeding is not properly brought according to law in such cases.

The application for writ of Habeas Corpus not setting up any sufficient grounds for the relief prayed for therein, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the application of O'Neal Massey for a writ of Habeas Corpus be not heard, but that it be and it is hereby dismissed; to which judgment of the court the relator excepted and gave notice of appeal to the Court of Criminal Appeals at Austin, Texas."

(c) In May, 1945, still complaining of his conviction on March 11, 1941, in San Jacinto County, Petitioner filed in the District Court of Walker County his petition for the Writ of Habeas Corpus, and on July 19, 1945, the Judge of that Court granted the Writ, and set same for hearing on July 26, 1945, before the District Court of San Jacinto County. In such Petition for such Writ, he says of the March 11, 1941, conviction:

"That the court erred in accepting the jury verdict for the reason the jury failed to assess a penalty in said verdict.

That the judgment of conviction is void and illegal for the reason that it is uncertain in the punishment assessed.

The relator contends, the sentence is void and illegal, for the reason it is not supported by the jury verdict, or by the [p. 6] judgment of conviction, in the penalty assessed."

In seeking to disqualify the Judge of the District Court of San Jacinto County, Petitioner uses this language:

"That the time of the trial of cause No. 5070, styled The STATE OF TEXAS vs. O'NEAL MASSEY, by the 9th Judicial Dis-

trict Court of San Jacinto County, Texas, the relator was confined to the Texas State Penitentiary Psychopathic Ward, Huntsville, State Prison as an insane patient.

That relator was released from said insane ward, to the San Jacinto County officials to stand trial in said cause.

That when said cause was called for trial on March 11th, a.d. 1941, the judge of said court was properly informed that the relator was being placed on trial in said cause in an insane state of mind, without benefit of counsel.

That through prejudice of the presiding judge, Honorable W. D. Browder, the trial was ordered to proceed without recognizing the insane condition of the relator, and through prejudice, said Judge Honorable W. B. Browder refused to appoint counsel for relator, therefore depriving the relator of his constitutional rights."

On July 19, 1945, the District Attorney of San Jacinto County filed in the District Court of San Jacinto County in cause No. 5070, State of Texas v. O'Neal Massey, his application that a nunc pro tunc order be entered, fixing the time of Petitioner's con-
24 finement in the penitentiary under the judgment and sentence of March 11, 1941. Such application for a nunc pro tunc order was filed July 19, 1945, set for hearing for July 26, 1945, and Petitioner notified on July 25, 1945. Petitioner, although still confined in prison, at once made application to the Clerk of the Court for the summoning of a number of witnesses to appear on the date set for hearing. Subpoenas were issued for such witnesses present at the hearing on July 26, 1945, and they were not present. One of these witnesses was Joe Byrd. At the hearing a nunc pro tunc order was entered, correcting the Judgment of March 11, [p. 7] 1941, and ordering Petitioner confined in the State Penitentiary for the balance of his life.

On the same date, Petitioner's Petition for the Writ of Habeas Corpus was denied.

Petitioner appealed both such nunc pro tunc judgment of conviction and the habeas corpus proceedings to the Court of Criminal Appeals of Texas, where it was affirmed by that court on January 9, 1946, and rehearing refused January 30, 1946 (191 S.W (2d) 877). Petitioner applied to the Supreme Court of the United States for a Writ of Error, which was denied on October 21, 1946 (329 U. S. 674).

(d) At the October Term 1946 of the Court of Criminal Appeals of Texas, Petitioner filed Petition for the Writ of Habeas Corpus, which was denied by said Court on December 4, 1946. No appeal was taken.

(e) Prior to the filing of this Petition for the Writ of Habeas Corpus, Petitioner on April 23, 1945, filed his petition for such

writ in this Court, No. 1711, in the matter of O'Neal Massey, petitioner. Said Petition was denied by Judge Hannay September 29, 1945, for lack of jurisdiction.

Conclusions of Law.

1:—Petitioner complains of his trial, conviction and sentence in cause No. 5070, State of Texas v. O'Neal Massey, in the District Court of San Jacinto County, Texas, on March 11, 1941, as set forth in the foregoing findings. He also complains of the nunc pro tunc order entered in such cause on July 26, 1945.

The procedure in criminal cases in Texas afforded Peti-
25 tioner [p. 8] ample remedy for the review of such proceedings. He has exhausted such remedy by appeal to the Court of Criminal Appeals of Texas (Ex Parte Massey, 191 S.W. (2d) 877) and by application for Writ of Error to the Supreme Court of the United States (Massay v. Texas, 329 U. S. 674).

I conclude, therefore, that this Court has jurisdiction of this Petitioner's Petition for Habeas Corpus and that Petitioner's complaint should here be inquired into and examined. Donald Wade v. Nathan Mayo, — U. S. —, decided June 14, 1948. Ex parte Abernathy, 320 U. S. 219. Ex parte Hawk, 321 U. S. 114, Marino v. Ragen, 332 U. S. 561, Mooney v. Holohan, 294 U. S. 103. House v. Mayo, 324 U. S. 43.

2:—Petitioner claims that he was tried and convicted in such suit No. 5070, State of Texas v. O'Neal Massey, on March 11, 1941, while insane. The record of the trial shows that Petitioner was legally indicted by a Grand Jury and the indictment filed in the District Court of San Jacinto County. *At the trial, he was represented by counsel,* and entered a plea of not guilty and was tried before a jury. The record also shows that the jury returned its verdict, finding Petitioner guilty as charged in the indictment. But Petitioner says he was at the time of his trial of unsound mind.

Clearly as indicated in the foregoing findings, he was at times and from time to time of unsound mind for several months before and several months after March 11, 1941, the date of the trial. But the evidence does not satisfactorily show that at the time of the trial, he was of unsound mind. As stated, he was represented by counsel, and I do not think that the evidence is sufficient to permit or require me to strike down the judgment and sentence on the ground that he was of unsound mind at the time of the trial. [p. 9]

3:—Petitioner's claim that he was deprived of his constitutional rights in being put to trial on the State's Motion for nunc pro tunc Order, correcting the Judgment entered against him March 11, 1941, must also fall. As held by the Court of Criminal Appeals on Defendant's appeal of that case, the Judgment and Senterce entered March 11, 1941, by the District Court of San Jacinto County was sufficient without any correction and without the aid

of the nunc pro tunc Order. Ex parte Massey, 191 S.W.(2) 877,
and cases there cited. And I think Petitioner is bound by
26 the decision of the Court of Criminal Appeals in the case.
House v. Mayo, 324 U. S. 43. Bailey v. Sheriff, 155 Fed.
(2d) 754, and other similar cases.

4:—As shown by Paragraph (b) of the foregoing Findings of Fact, Petitioner, complaining of such conviction on March 11, 1941, in No. 5070, State of Texas v. O'Neal Massey, in San Jacinto County, applied to the Honorable E. T. Murphy, Judge of the District Court of Montgomery County, on or about March 22, 1943, for the Writ of Habeas Corpus. In his Petition and Amended Petition, he complains of substantially the same matters of which he is complaining here, including the claim that he was insane or of unsound mind at the time of his trial on March 11, 1941. He was given a hearing of such Petition for Habeas Corpus before the District Judge of San Jacinto County, and his Petition was dismissed. See Order recited in Findings of Fact. He did not appeal.

Thereafter, still complaining of his trial and conviction on March 11, 1941, Petitioner, as set forth in Paragraph (c) of the foregoing Findings of Fact, petitioned the District Court of Walker County, Texas, for the Writ [p. 10] of Habeas Corpus. His Petition was granted, and the hearing set before the District Judge of San Jacinto County, who instead of certifying it to the Court of Criminal Appeals of Texas, as then required by law, heard and denied it. Petitioner appealed to the Court of Criminal Appeals of Texas, where the Habeas Corpus was denied and the Judgment of such District Court was affirmed (Ex parte Massey, supra), and Writ of Error to the Supreme Court of the United States denied (Massey v. Texas, supra).

In all of these proceedings, Petitioner was in one way or another raising the same questions that he is raising here, and he is bound by the decisions of such Courts thereon. House v. Mayo, supra. Bailey v. Sheriff, supra.

Concluding that on the whole case, Petitioner fails, his Petition for Writ of Habeas corpus is denied.

Let proper Decree be drawn and presented.

T. M. KENNERLY,
Judge.

27 EXHIBIT B TO RESPONDENT'S ANSWER

In the United States District Court, Southern District of Texas
Houston Division

IN THE MATTER OF THE APPLICATION OF O'NEAL MASSEY FOR THE WRIT OF HABEAS CORPUS

Memorandum and Order:

Heretofore O'Neal Massey, an inmate of a State Penitentiary, in this District and Division, petitioned for the issuance of the Writ of Habeas Corpus, and his Petition, after full hearing, was denied. See Findings of Fact and Conclusions of Law, dated June 29, 1948, filed in Cause No. 2380, Houston Division. This action was on appeal affirmed by the Court of Appeals. See O'Neal Massey v. H. E. Moore, Warden, 173 Fed. (2d) 980.

Massey has now presented to me another Petition for the Writ of Habeas Corpus, which he claims presents new questions not involved nor decided in the former case No. 2380. These he claims are:

(a) That he was of unsound mind at the time of his trial on March 11, 1941, in the District Court of San Jacinto County, Texas.

(b) That he was not represented by counsel at such trial on March 11, 1941.

1. Massey is in error in his claim that the question of whether he was of unsound mind at the time of such trial was not litigated and (p. 1) decided in such former case No. 2380 in this Court. It was. Therefore, that question cannot, under Section 2244, Title 28, U. S. Code, Judiciary and Judicial Procedure, be regarded as a *new* ground in the present proceeding. I have, however, examined the proceedings in the former trial, including the transcript of the evidence, and have concluded that the ends of justice will not be served by examining that question again.

28 2. The other question of whether O'Neal Massey was represented by counsel at such trial on March 11, 1941, is a new one. The copies of the Judgment of his conviction offered at the former trial here showed on their face that he *was* represented by counsel. The case was tried on the theory that he was represented by counsel. Now he presents to me a certificate of the Trial Judge and also of the District Attorney and affidavits of other persons that he was not at such March 11, 1941, trial represented by counsel. Under the rule laid down in Palmer v. Stanley, — U. S. — (decided December 11, 1951) and cases there cited and discussed, a serious question is presented.

However, Massey is also insistent that the question of his not

being represented by counsel at such trial has not been passed upon by the Courts of the State of Texas. He is correct, because as stated the record of his conviction showed that he was represented by counsel. It is certain, therefore, that as to such question, Massey has not exhausted the remedies available to him in the Courts of Texas. (See Section 2254, Title 28, of such Code, and Darr v. Burford, 339 U. S. 200, and other cases).

Basing my action wholly upon such failure of Massey to exhaust the remedies available to him in the Courts of Texas, but deciding (p. 24 no other question, I decline to either award the Writ of Habeas Corpus or to enter a Show Cause Order.

The Clerk will record this Memorandum and Order on the minutes, and will place the papers which are passed to him herewith among the files in this office and retain and preserve same until further Orders of the Court.

The Clerk will also furnish O'Neal Massey and the Attorney General of Texas each with a copy of this Memorandum and Order.

Done at Houston, Texas, this January 9, 1952.

T. M. KENNERLY,
Judge.

29 EXHIBIT C TO RESPONDENT'S ORDER

In the United States District Court, Southern District of Texas
Houston Division

IN THE MATTER OF THE APPLICATION OF O'NEAL MASSEY FOR THE WRIT OF HABEAS CORPUS

On this day came on to be considered the Petition of O'Neal Massey for the Writ of Habeas Corpus. For the reasons set forth in Memorandum today filed, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that such Petition be denied.

The Clerk will furnish O'Neal Massey and the Attorney General of Texas each with a copy of this Order, together with a copy of such Memorandum.

Done at Houston, Texas, this January 9, 1952.

T. M. KENNERLY,
Judge.

30 EXHIBIT D TO RESPONDENT'S ANSWER

In the United States District Court, Southern District of Texas
Houston Division

IN THE MATTER OF THE APPLICATION OF O'NEAL MASSEY FOR THE WRIT OF HABEAS CORPUS

Memorandum and Order:

On January 9, 1952, a Memorandum and Order was filed and Order entered, disposing of this matter. See such Memorandum and Order.

Petitioner Massey has now written me a letter, dated January 12, 1952, sending his Motion for Rehearing. Attached to such Motion are certain copies of purported proceedings in the Courts, copies of letters, etc. All of these I have examined, but they seem immaterial.

The Certificate of the Trial Judge at the trial of March 11, 1941, mentioned in my Memorandum of January 9, 1952, which is admissible under Section 2245, Title 28, U. S. Code, Judiciary and Judicial Procedure, is dated September 16, 1950. This Certificate, as stated, shows that the Record of the Judgment of the Court, etc. is not correct, and that Massey was not represented by counsel at such trial. Since September 16, 1950, therefore, there has been a *new* question of whether under the authorities Massey had a trial in accordance with the Federal Constitution. Neither in his Petition for the Writ of Habeas Corpus nor in his Motion for Rehearing does Massey make any showing that as to that question he has exhausted the remedies available to him in the Courts of Texas. The question may have incidentally been referred to in some of the many proceedings in the State Courts, but always it was disposed of in the light of Massey's sentence showing that he was represented by counsel.

I think that Massey, moving under Article 119 of Vernon's Annotated Criminal Statutes of Texas, should present his Petition
31-33 for the Writ of Habeas Corpus to the Judge of the District Court of San Jacinto County.

IT IS ORDERED that Massey's Petition for Rehearing be and the same is hereby over-ruled.

The Clerk will record this Memorandum and Order on the Minutes of the Court and will furnish O'Neal Massey and the Attorney General of Texas each with a copy hereof, and will place the papers which accompany Massey's Motion for Rehearing among the files in

his office and retain and preserve same until further Orders of the Court.

Done at Houston, Texas, this January 18, 1952.

T. M. KENNERLY,
Judge.

34 In United States District Court

CERTIFIED COPY OF OPINION OF COURT OF CRIMINAL APPEALS OF TEXAS—Filed Sept. 11, 1952

On March 11, 1941, relator was convicted in the District Court of San Jacinto County under an indictment charging the primary offense of robbery by assault, a non-capital felony, and containing, in addition, allegations showing relator's two prior convictions for a like offense. The jury found relator guilty, as charged, and under the provisions of Art. 63, P. C., known as the habitual criminal statute, the court fixed the punishment at life imprisonment.

The judgment of conviction was in all things regular upon its face, and showed that it was rendered upon a plea of not guilty by relator in open court with "counsel also being present." No appeal was taken from that judgment, and it became final.

Since that time, relator, without avail, has, by various writs of habeas corpus, sought from the courts—both state and federal, and also the Supreme Court of the United States—relief from custody under the judgment. In most of these endeavors, relator alleged that he was not represented by counsel upon the trial of the case and also that he was insane at the time. He appears, however, not to have established such allegation by the facts.

In the instant proceeding, a writ of habeas corpus was granted by the judge of the District Court of Walker County, Texas, who, after developing the facts, certified the proceedings to this court for determination, under the provisions of Art. 119, C.C.P., as amended.

Among the facts so developed and certified are the affidavits of the judge presiding and the district attorney prosecuting at the trial, which are as follows:

In the District Court, 9th Judicial District of Texas

"THE STATE OF TEXAS,
County of Montgomery:

"I W. B. BROWDER, Judge of the Ninth Judicial District of Texas, do hereby certify the following facts:

35 "I am the duly qualified and acting Judge of the Ninth Judicial District of Texas, which District includes San Jacinto

County, Texas. I was acting in such capacity on March 11, 1941, and presided at the trial of O'Neal Massey in the Cause No. 5070 in the District Court of San Jacinto County for the offense of robbery by assault.

"At the time Massey was arraigned in open court, the Honorable W. C. McClain, then District Attorney of said District and County, announced that if the defendant desired to plead guilty to the charge against him, the said McClain would recommend that the Court fix the minimum punishment for said offense, to-wit, five years' confinement in the State Penitentiary. Defendant Massey refused to plead guilty and insisted on being tried by jury upon his plea of not guilty.

"At the time of such trial Massey was not indicted for a capital offense, was not eligible to make application for suspended sentence, and a jury was not waived. It was not made known to the Court that the defendant was claiming to be insane, and no plea of insanity was interposed. There were no unusual or special circumstances which appeared to require the appointment of counsel. Therefore no counsel was appointed and Massey proceeded to trial without counsel.

"(S.) W. B. BROWDER.

"Sworn to and subscribed before me this 1st day of April, 1952.

"[SEAL] (S.) R. J. GRAY,
"Clerk of the District Court of
Montgomery County, Texas.
"By (S.) BILLIE JEAN SIMPSON,
Deputy."

"THE STATE OF TEXAS,
County of Montgomery:

"BEFORE ME, the undersigned authority, a Notary Public in and for Montgomery County, Texas, on this day personally appeared W. C. McClain, known to me who, being by me first duly sworn, on oath did depose and say:

"In the month of March 1941 I was duly elected, qualified and acting District Attorney of the Ninth District of Texas, including San Jacinto County, and I was the prosecuting attorney who represented the State of Texas in the trial of Cause No. 5070 in the District Court of San Jacinto County, styled the State of Texas v. O'Neal Massey. In this cause Massey was indicted for the offense of robbery by assault, with averments as to two previous felony convictions.

"When Massey was arraigned, I stated to him in open court that if he desired to plead guilty to the indictment I would recommend to the court that Massey be given the minimum sentence of five years

in the State Penitentiary. Massey refused to plead guilty, but insisted upon pleading not guilty and upon being tried by jury.

"No counsel was appointed by the Court to represent Massey, nor did Massey have counsel of his own choosing.

36 "It was not made known to me at the time of such trial that Massey was claiming to be insane and no plea of insanity was interposed.

"(Signed) W. C. McCLAIN.

"(Seal) Sworn to and subscribed to before me this 1st day of April, 1952.

"(Signed) RUTH HAZEL PARSLEY,
Notary Public in and for Montgomery County, Texas.
(Printed) (RUTH HAZEL PARSLEY)".

By these affidavits, relator has sustained his allegation that he was not represented by counsel upon the trial of his case. In addition to that fact, however, the affidavits specially negative the existence of facts which would require the appointment of counsel for an accused under the statute law of this state. We have no statute in this state requiring the appointment of counsel for an accused upon a plea of not guilty to the ordinary felony offense of robbery.

In view of the fact that the court, as well as the representative of the state, offered relator a term of five years in the penitentiary upon his plea of guilty, it can hardly be said that such officers were guilty of any misconduct in the case which brought about or were reflected in the conviction.

The case of Parsons v. State, 218 S. W. 2d 202, is authority for our conclusion that the failure to appoint counsel for relator does not vitiate the judgment of conviction. In the Parsons case, supra, we had occasion to review the decisions of the Supreme Court of the United States touching the necessity of the appointment of counsel in state court trials for ordinary felonies. We there said:

> "The further expressions contained in, as well as the disposition made of, the Uveges case convinces us that it is presently the holding of the Supreme Court of the United States that the necessity for furnishing counsel to an accused upon trial for a crime less than capital depends, in a State court, upon the facts in each case, in the determination of which there must be taken into consideration the gravity of the crime, the age and education of the accused, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged, and the possible defense thereto."

Since the Parsons case, the Supreme Court of the United
37 States has had occasion to pass upon the question: In Gibbs v. Burke, 337 U. S. 773, 93 L. Ed. 1686; Quicksall v. Michigan, 339 U. S. 660, 94 L. Ed. 1188; and Palmer v. Ashe, 96 L. Ed., Advance Opinions, 130.

The latter cases do not appear to change the law as understood and announced by us in the Parsons case. Those cases, as well as all others by the Supreme Court of the United States, turn upon that court's view of the undisputed facts.

No stronger evidence of relator's ability to represent himself upon the trial of his case can be offered than his conduct and examination of the witnesses upon the instant trial. Surely, in the light of the record, it cannot be said that relator is a novice at this business of being tried for crime or that he did not know what he was doing when he undertook to represent himself. Appellant made no request that the court appoint counsel for him. The record before us is susceptible of no construction other than that relator knowingly waived any right to be represented by counsel upon the trial of the case, and there is nothing in the record which reflects that a different result would have occurred had the court appointed counsel.

We are constrained to conclude, therefore, that relator has failed to bring himself within the decisions of the Supreme Court of the United States requiring appointment of counsel for an accused upon trial in a state court for an ordinary felony.

In the recent case of Ex Parte McCune, 246 S. W. 2d 171, we had occasion to adhere to our prior holdings that the common law writ of coram nobis has no application in this state and that the right to re-open and re-examine a prior final conviction does not exist in this state. This rule is here applicable as to relator's contention that he was insane at the time of trial.

The record before us does not reflect that relator is entitled to be discharged from custody under the judgment of conviction.
38 The relief prayed for by the writ of habeas corpus is denied.

DAVIDSON, *Judge*.

(Delivered May 28, 1952)

Opinion approved by the court.

39 Clerk's certificate to foregoing paper omitted in printing.

40-58 In United States District Court

CERTIFIED COPY OF STATEMENT OF FACTS IN THE COURT OF CRIMINAL APPEALS OF TEXAS—Filed Sept. 11, 1952

59 Doctor M. E. CURTIS, called as a witness by the Petitioner, after being duly sworn, testified:

DIRECT EXAMINATION.

Questions by Mr. MASSEY:

Q. State your name, please?
A. I beg your pardon.
Q. State your name, please?
A. M. E. Curtis.
Q. Are you a practicing physician?
A. Retired.
Q. Now, about September of 1939, where were you employed?
A. I am pretty deaf. You will have to talk louder, if you don't mind.
Q. Where were you employed in 1939?
A. Eastham Farm. (37)
Q. As what?
A. Physician.
Q. As physician to the farm?
A. Yes, sir.
Q. Sometime in September, 1939, were you robbed of your automobile by escaping inmates?
60 A. I was kidnapped by them.
Q. Will you please tell the Court what occurred on the night you lost your automobile, as near as you can remember?
A. Well, I was in my house——.

Mr. GRESHAM: We object to that because I don't see what relevancy that has to this hearing.
The COURT: Let's let him go ahead.
Mr. GRESHAM: Note our exception.

A. (Con't) I was down at my house, a house that was given me by the State, and two men came down and called me out and said that there was a man caught in the press and wanted me to come up and give him a "hypo" while they cut him out. I put on a few clothes and grabbed my bag and started out and they caught me and threw me down and took my keys away from me and made me get in the car and drove me out on the Weldon highway and in a round about way through Luf-(38) kin and back to Shepherd. They put me out close to Shepherd and took my car and went on.

Q. Now, Dr. Curtis, was you forced into the car against your will on the Eastham Farm?

A. I was.

Q. When you was released near the San Jacinto County line, do you know which side of the line you was released on?

A. No, I don't.

Q. Did you later on testify in the District Court of San Jacinto County, Texas, against the boys who took your automobile?

A. Yes, I appeared in court.

Q. Against the boy that they claimed took your car?

A. I didn't recognize the men at all as I never saw them. I never could see them as they kept their faces out of my sight.

Q. At the trial there then, did you identify me as being one of the persons who took your car?

A. No.

Q. Did you ever, at the trial, state whether or not that actually happened to you in San Jacinto County?

61 A. I think I gave the same testimony that I have given here.

Q. Do you recognize me as being one of the defendants at that trial, do you not?

A. No, I don't. It has been so long and I didn't pay very (39) much attention to the prisoners at all. I just went over there and gave my testimony and got up.

Q. Do you recall whether or not you were cross examined?

A. I don't think so.

Q. The prisoner, whom they were trying, did he ask any questions at all?

A. I don't think. I think probably the lawyers were the only ones to ask me any questions.

Q. Just the District Attorney?

A. Yes, I guess so.

Q. Were you present when other witnesses testified in the same case?

A. I don't know whether I was or not. As soon as I got through and as soon as I got excused I came on back to the Eastham farm.

62 JOE BYRD, called as a witness by the Petitioner, after being duly sworn, testified:

DIRECT EXAMINATION.

QUESTIONS BY MR. MASSEY:

Q. State your name, please?

Q. How long have you been connected with the Texas Prison System, Captain Byrd?

A. Fifteen (15) years.

Q. What position do you hold there now? (42) (No page 43)

A. Assistant Warden.

Q. How long have you been Assistant Warden?

A. Oh, about nine years.

Q. Prior thereto, hadn't you for a short while held the position of Assistant Warden?

A. Sergeant of the Guards.

Q. You testified at a Federal habeas corpus hearing in 1948, that about January, 1941, until sometime in August, I was more or less of unsound mind, however you stated at times I appeared to
63 be normal; Captain Byrd, I would like to ask you, to the best of your memory, at times when I appeared to be normal, do you believe I was fully normal?

A. No, I don't. I didn't think you had very much sense.

Q. Now, about March 7, 1941, the record shows, you and Mr. T. W. Arnold released me from the State Insane Ward to the Sheriff of San Jacinto County, Texas is that correct?

A. Now, let me think a minute. Me and Arnold went over there and got you out of the psychopathic ward, but I don't remember when it was, and turned you over to the law in San Jacinto County. I don't remember the date.

Q. Do you recall whether or not you told these officers from San Jacinto County that I was being released to them from the insane ward?

A. Oh, I don't remember about that. I might have and it seems like I did. (44)

Q. Captain Byrd, how long have you known Mr. T. W. Arnold?

A. Oh, I have knowed him ever since—he was up there when I went to work there.

Q. Did you find him to be a reliable person?

A. Yes.

Mr. MASSEY: That will be all.

CROSS EXAMINATION.

Questions by Mr. GRESHAM:

Q. Captain, there is a lot of difference between the insane ward and what you call the psychopathic ward?

A. Well, I meant the psychopathic ward. If I said insane ward, I didn't mean it. I mean the psychopathic ward, that is what I thought he was relating to.

Q. So far as you know O'Neal Massey has never been in the insane ward?

A. Not that I know of. I never knowed him except up here.

Q. The psychopathic ward——?

A. Well, if I said insane, I didn't mean it quite that way. I meant the psychopathic ward.

Q. The psychopathic ward is the place where they place men from time to time for observation? (45)

64 A. For observation and those that are crazy, yes sir.

Mr. GRESHAM: I believe that's all.

DIRECT EXAMINATION.

Questions by Mr. MASSEY:

Q. Captain Byrd, they also keep prisoners with judgments of insanity against them from this Walker County Court; they also keep those in the psychopathic ward?

A. Well, anybody that's crazy is kept in the psychopathic ward. And sometimes, as the Judge says, they are kept in there for observation.

Questions by Mr. GRESHAM:

Q. Now, the men up there who have been convicted of lunacy or insanity, down here in the courts of Walker County or elsewhere after they have gotten to the penitentiary, are placed in the Texas Prison Psychopathic Hospital as provided by law?

A. That's right. If I said insane ward, I meant to say psy- (46) chopathic ward.

Q. The psychopathic ward is what you used to call the Nine Row, isn't it?

A. The Nine Row is over in the west building. It is just a row of cells where they kept the worst ones.

Q. Massey was in Nine Row from time to time?

A. The first time ever I seen him, he was on Nine Row.

Mr. GRESHAM: That's all, Captain.

DIRECT EXAMINATION.

Questions by Mr. MASSEY:

Q. Captain Byrd, the psychopathic ward that we are discussing, they just have one ward that they keep people in whether they are of unsound mind or whether they are just there for observation, isn't that correct?

A. Yeh, the psychopathic ward is just a building off to itself.

Q. They do keep people there who are of unsound mind?

A. Yes.

Mr. MASSEY: That's all. (47)

65 CROSS EXAMINATION.

Questions by Mr. GRESHAM:

Q. It is part of the hospital building?
A. Part of the hospital building.
Q. And it is completely separated and it has individual cells in it?
A. Yes, sir.
Q. It is not just one big room where they are all together?
A. Well, they have a ward there for those that are not quite so bad, but if they are violent they have cells for them.
Q. Separate and individual cells?
A. Yes sir.

Mr. GRESHAM: That's all.
Mr. MASSEY: I next offer in evidence Captain Byrd's testimony in civil action No. 2380 in the United States District Court.

JOE BYRD was called as a witness in behalf of the petitioner and, having been first duly sworn, testified as follows: (48)

DIRECT EXAMINATION.

By Mr. GOLDING:

Q. You are Joe Byrd?
A. Yes, sir.
Q. Speak a little loud, will you, Mr. Byrd?
A. Yes, sir.
Q. So the Court and lawyers can hear you?
A. Yes, sir.
Q. What is your present occupation?
A. Chief transfer agent now.
Q. Chief transfer agent of the Texas Penitentiary System?
A. Yes, sir.

The COURT: What are your initials?

A. J o e, Joe Byrd.
Q. Mr. Byrd, what are your duties with the Texas Penitentiary System, during the period January, 1941, up until about July, 1945?
66 A. I was assistant warden.
Q. Were you assistant warden during the period from January, 1941, to about March 11 or 12, 1941?
A. Yes, sir.
Q. Do you know O'Neal Massey?
A. Yes, sir.
Q. Mr. Byrd, can you tell the Court whether or not O'Neal Massey (49) the petitioner in this case, was or was not in the psycho-

pathic ward or hospital at the Texas State Penitentiary during the period January, 1941, up to and including March 11, 1941?

Mr. GRESHAM: Your Honor, we object, for the reason we objected to Dr. Hanson's testimony.

The COURT: Same ruling. That is, I am taking the objection with the case.

Q. Do you understand the question?

A. Yes, sir.

Q. What is your answer?

A. You know Nine Row——

Q. Just answer that question first. Was he or not in the psychopathic hospital or ward?

A. Yes, sir.

Q. He was?

A. Yes, sir.

Q. Mr. Byrd, was he in the psychopathic ward or hospital continuously from the beginning of January, 1941, up to and including March 11, 1941?

A. Well, just the date, I cannot recall dates. And Nine Row is an overflow from the psychopathic ward. If the psychopathic ward was full, we put them in Nine Row. At that time, Nine Row was just the holdover for the psychopathic ward. (50)

Q. It is what the inmates know as luxury row, isn't that what they call it?

A. We call it Nine Row. That is the only thing I know about it.

Q. Tell us, Mr. Byrd, where O'Neal Massey was during that period January to March, 1941.

A. He was in the psychopathic ward most of the time.

67 Q. Do you know whether or not he was being treated in the psychopathic ward during that period?

A. Well, I don't know what treatment. I don't know that.

Q. Do you remember the date or dates, Mr. Byrd, I think it was March 11, 1941, when O'Neal Massey was removed from Nine Row or removed from the psychopathic ward at Huntsville, Texas, and brought over to court in San Jacinto County, Texas? Do you remember that?

A. Yes, sir. He was in the psychopathic ward, and we brought him over to the warden's office and turned him over to, I reckon, the sheriff, somebody out of San Jacinto County.

Q. Did you get him out of the hospital on March 11, and turn him over to the sheriff?

A. If that is the date. I don't recall the date. It was along about there though.

Q. Your recollection is that you turned him over to some sheriff or deputy?

A. Yes, sir. (51)

Q. Did you know at that time where they were taking O'Neal Massey?

A. Yes, sir, I heard they were carrying him, they told me, to San Jacinto County.

Q. To stand trial for some offense?

A. Yes, sir.

Q. Mr. Byrd, just before you had turned this petitioner over to such authorities, or rather to the sheriff, for the purpose of transporting him to San Jacinto County, had you previously had occasion to observe how this man O'Neal Massey conducted himself while he was in the custody of the psychopathic authorities?

Mr. GRESHAM: Your Honor, the same objection.

The COURT: Same ruling.

A. Yes, sir.

Q. Let me ask you this, before you answer any further on that. Have you had occasion, Mr. Byrd, during your many years with the penitentiary system in Texas to be around inmates who are alleged to be mentally deranged?

A. Yes, sir.

Q. For what period of time have you been around them?

A. I have been around them eight years. I have been with the prison system eleven years.

68 Q. Before this petitioner was turned over by you to the sheriff for the purpose of being transported to San Jacinto County, (52) Texas, from the psychopathic ward, previous to that time, had you had occasion to observe O'Neal Massey?

A. Yes sir, I did.

Q. How did he conduct himself with reference to whether or not be deported himself as a man in full possession of his faculties, or whether he was a person who at times had certain deranged ideas?

Mr. GRESHAM: We make the further objection that he is not qualified.

The COURT: He can testify to such things as he knows of his own knowledge. I think a layman may give what the doctors call objective symptoms.

Tell us how he acted, Mr. Byrd?

A. Sir?

Q. How did O'Neal Massey act?

A. I will tell you, one time his father came to see him and wanted to visit him, and of course whenever they go over there to the psychopathic ward, there is somebody to go with him, and I went with Mr. Massey, his father, and O'Neal wouldn't pay a bit of

attention to him. He wouldn't even look at him, wouldn't speak. Then another time he broke out of the psychopathic ward and ran out on the yard, and some guards called me, and the first man that got to him was Mr. Lee Allen, and he knocked him down, hit him with (53) his fist, and they had a pretty good little round there. When we got there, of course, Captain Moore, the warden at that time, we got around him and put him back in the psychopathic ward. Several times I took him out to bathe him, go to the bath house, and he just sulked. We would have to manhandle him, in other words.

Q. How soon did these things happen before March 9, which you say was the date you turned him over from the psychopathic ward to some law official of San Jacinto County?

A. It was just a very few days, that he hit that guard down there. I don't remember the date, but it was a very short time.

Q. During that period of time, Mr. Byrd, can you tell us whether or not the petitioner was sullen?

A. Very sullen. He was sullen, and of course, you had to manhandle him. He would fight you.

Q. Mr. Byrd, was that an unusual situation with respect
69 to this petitioner and the other inmates at that time?

A. Yes, very much so. I would go over to the psychopathic ward at times and he was all right, friendly, and talked. I know I wanted to give him a raking over the coals for not speaking to his father.

Q. What was his reaction to that, Mr. Byrd?

A. He said, "When was my father here?" Those were the words he asked me. And I said: "You know he was here yesterday," or whatever day it was. (54) And he said: "Why didn't you bring him in and let me see him?" I believe those were about the words.

Q. Mr. Byrd, was that shortly before he was sent over to San Jacinto County?

A. Yes, sir, just a very few days; maybe two or three or four days. I don't remember the dates.

Q. Mr. Byrd, he was brought back to Huntsville, Texas, was he not, shortly after March 11, 1941?

A. Yes, sir.

Q. Was he turned over to you after he came back from San Jacinto County, Texas?

A. Yes, sir. He mutilated himself, and he was——

Q. Cut his wrists?

A. Yes. They treated him over there at the hospital, and I put him over there on Nine Row.

Q. You put him over on Nine Row?

A. Yes, sir.

Q. He was treated by Dr. Hanson?

A. I don't know who treated him there, but he was treated at the hospital.

Q. Mr. Byrd, how long did O'Neal Massey stay on Nine Row after you say you found him there upon his return from San Jacinto County, Texas? (55)

A. I don't remember just how long he did stay over there.

Q. To refresh your recollection, wasn't it up to and including August 1941?

A. It was around that, yes.

Q. During that period from March to August, 1941, Mr. Byrd, did you have occasion to visit and observe O'Neal Massey on Nine Row?

A. I did.

Q. How did he conduct himself?

A. I will tell you what happened. On one occasion he sent
70 for me up there, and he said Dr. Hanson was through some way giving him dope or something through the radio; coming down and getting it into his body somehow or other. He never could exactly explain it.

Q. He accused Dr. Hanson of giving him dope through the radio, into his body.

A. Yes.

Q. How soon was that after he had been returned from San Jacinto County, Texas?

A. I don't remember just how long. I don't remember.

Q. Was that the only incident that you observed until he was released from the psychopathic ward?

A. Well, very nearly every time that we would have to take him to a bath or to shave he would sulk. Not every time, but lots of times. (56)

Q. Why?

A. He would just sulk, or wouldn't go. He would just buck.

Q. Based upon your experience as a guard or assistant warden of the penitentiary system, of which you say yo- have been a member for a number of years, would you say, based upon your mental observation and handling of the man, that he acted unusually peculiar?

A. I certainly would, yes, sir, at times, I would. You can go around at times and he is normal.

Q. Now, Mr. Byrd, is it your statement that to the best of your recollection O'Neal Massey was released from the psychopathic ward or Nine Row some time in August, 1941?

A. That would be mostly a guess, but I think that is about right.

Q. Has he been in the psychopathic ward or hospital or Nine Row since August, 1941, up to the present time?

A. I don't really believe he has, but I don't remember.

Q. You brought the petitioner down from Huntsville this morning, did you not, Mr. Byrd?

A. Yes, sir.

Q. You were designated by the warden of the Texas State Penitentiary System to bring him here and take him back safely?

A. Yes, sir.

71 Q. During the period that you say O'Neal Massey acted normally, state whether or not during those periods he appeared to (57) be kind and gentle and to react normally to kindnesses extended to him?

A. Well, I would say that he was, yes, sir. He was not vicious like he was when he had one of those spells.

Q. During those periods you have denominated as being periods of normalcy, did you have any trouble with petitioner?

A. No, sir.

Q. Did anybody else?

A. No, sir, not that I know anything about, and I am sure I would have known it.

Mr. GOLDING: Take the witness.

Mr. GRESHAM: No questions.

The COURT: Call your next witness.

Mr. MASSEY: Judge Rogers showed me a letter that stated that Mr. T. W. Arnold was dead.

The COURT: Yes, it was a letter from the sheriff of Hopkins County.

Mr. MASSEY: I would like to introduce that letter along with Mr. Arnold's affidavit. I next offer in evidence the sworn affidavit of Mr. T. W. (56) Arnold, under the date of September 18, 1950, marked Petitioner's Exhibit No. 6. And a letter of the Hopkins County Sheriff, dated April 1, 1952, showing that Mr. Arnold is now deceased, marked Petitioner's Exhibit No. 7.

STATE OF TEXAS,
County of Hopkins:

AFFIDAVIT

Mr. T. W. Arnold being duly sworn according to law deposes and states:

That from 1933 until 1943, I was employed by the State of Texas, as Building Superintendent at the State Penitentiary, Huntsville, Texas. That during said time, I handled many inmates of said institution who were of unsound mind.

That it is my opinion, based upon my aforesaid experience with

insane prisoners, that O'Neal Massey No. 96610, an inmate
72 of said institution was of unsound mind when tried and convicted in the district court of San Jacinto County, Texas, on March 11, 1941.

/s/ T. W. ARNOLD,
Sulphur Springs, Texas (59)

Sworn to and subscribed before me this 18th day of September, 1950.

/s/ BAYLESS W. EVANS,
District Clerk, Hopkins County, Texas.

SULPHUR SPRINGS, TEXAS

April 1, 1952

L. H. Tindall
District Clerk
Walker County
Huntsville, Texas.

Re: File No. 9984, State of Texas v. O'Neal Massey

Dear Sir:

Mr. T. W. Arnold of Brashear, Texas, witness in the above numbered cause, passed away in the Spring of last year, so we are returning this subpoena unserved.

If we can be of any further service to you in any manner, please call on us.

Yours very truly,

AVERA RASURE,
Sheriff, Hopkins County, Texas.
/s/ E. E. BYRD,
Deputy Sheriff.

79 J. C. HOGUE, called as a witness by the Respondent, after being duly sworn, testified:

DIRECT EXAMIN .TION.

Questions by Mr. GRESHAM:

Q. State your name, please?
A. J. C. Hogue.
Q. What official position, if any, do you hold in San Jacinto County?
A. Sheriff.
Q. How long have you been sheriff? (72)
A. I am serving my eighth term, sixteen years.

Q. You were the sheriff, then, in the month of March, 1941?
A. Yes, sir.
Q. Do you recall the time when O'Neal Massey was tried in the District Court of San Jacinto County for an offense?
A. Yes, sir.
Q. The offense was robbery by assault, was it not?
A. Yes, sir.
Q. Did you, as sheriff, have occasion to execute a bench warrant?
A. Yes, sir.
80 Q. I'll ask you to examine this bench warrant which has been introduced in evidence, and ask you if that is the bench warrant that you served?
A. Yes, sir.
Q. How did you serve it?
A. I went after Mr. Massey and brought him into Court.
Q. Where did you go?
A. Cold Springs.
Q. Cold Springs to Huntsville?
A. From Huntsville to Cold Springs.
Q. When you got the bench warrant did you go from Cold Springs to Huntsville?
A. Yes, sir.
Q. You served the bench warrant on the prison officials? (73)
A. Yes, sir.
Q. Did they deliver him?
A. They delivered me Mr. Massey and I returned him.
Q. I'll ask you if you did anything else on the day that you received Massey with reference to serving him with a capias?
A. Yes, sir.
Q. I'll ask you to examine this capias which was offered in evidence and ask you if that is a true copy of the capias that you served?
A. This here is a true copy.
Q. What date did you serve it?
A. The 26th day of February.
Q. On down here?
A. Oh. It came to hand on the 26th day of February and served it on the 7th day of March, 1941.
Q. Did you take Massey back to San Jacinto County with that day?
A. Yes, sir.
Q. The 7th of March?
A. Yes, sir.
Q. I'll ask you to state what his behavior and appearance was with reference to being a normal person or an insane person?
A. His appearance to me seemed to be normal.

Q. Did he act in what seemed to be to you a normal and natural (74) manner?

81 A. That's the way he seemed to me, natural and normal.

Q. Did you see him again when he was tried on the 11th day of March, 1941, in the District Court of San Jacinto County?

A. Yes, sir.

Q. What was his appearance as of that time?

A. Seemed to be normal, to me.

Q. Were you present at that trial?

A. Yes, sir.

Q. Did Doctor Curtis testify that day?

A. Yes sir, he sure did.

Q. He is the same Doctor Curtis who testified a few minutes ago?

A. Yes sir, the same man.

Q. Did anybody else testify?

A. They had several witnesses. I remember Doctor Curtis well and Mr. Waid, W. W. Waid, who used to be with the prison system.

Q. You remember that those two gentlemen testified?

A. Yes, sir, I remember those two.

Q. There were several witnesses?

A. Several witnesses, yes sir. (75)

CROSS-EXAMINATION.

Questions by Mr. MASSEY:

Q. Mr. Hogue, do you recall that I slashed my wrists while I was in your custody in San Jacinto County?

A. Yes sir, I recall that.

Q. Would you say such behavior was normal behavior?

A. Well, I never did know why you did it. They tried you up there in the Court and you got your sentence and we carried you down for lunch and they called me that you were trying to kill yourself or cut yourself with a razor blade.

Q. Did you, did that appear to be normal behavior?

A. Well, I don't know why you did that.

Q. Would you say that such behavior is normal?

82 A. You sure did look normal when I got you to throw the blade down.

Q. I didn't look normal?

A. You did look normal. You looked just like you had always looked only you were bleeding pretty bad.

Q. Do you know the nature of Doctor Curtis' testimony in the San Jacinto county court?

A. No sir, I couldn't recall.

Q. Do you know the nature of Warden Waid's testimony?

A. No sir. I just remember them being there. (76)

Q. What other witnesses testified for the State?
A. I just couldn't say. There were quite a bunch of witnesses.
Q. How many would you say, off hand?
A. Well, I don't know, but there were several witnesses.
Q. Did you hear me cross examine any witnesses in that court?
A. I don't recall. But I remember you represented yourself.
Q. You don't remember me saying anything?
A. I can't remember what you said. I just remember you represented yourself.
Q. The record shows that the conviction occurred on March 11, how soon thereafter did you return me to the penitentiary or did you return me?
A. The day that you was sentenced, I returned you that day.
Q. In other words, the same day that I was tried and convicted, I was sentenced, is that correct?
A. That's right.
Q. You immediately brought me back to the penitentiary?
A. I brought you back immediately after I got down there with the doctor and got that blood stopped.

DIRECT EXAMINATION.

Questions by Mr. GRESHAM:

Q. Of course, Massey had just received a life sentence a few (77) minutes before he slashed his wrists, had he not?
A. That's right.

Mr. GRESHAM: I will ask the District Clerk of San Jacinto 83-86 County to search the Grand Jury Minutes from January 1, 1940, through March 11, 1941, to see if there was ever more than one indictment returned against O'Neal Massey and will furnish that for the record.
The COURT: Yes sir.

THE STATE OF TEXAS,
County of San Jacinto:

I, Mrs. Imogene H. Trapp, Clerk, District Court, in and for San Jacinto County, State of Texas, do hereby certify that according to the records in my office, and to the best of my knowledge and belief, there was one and only one Indictment returned by the Grand Jury of San Jacinto County, Texas, against O'Neal Massey, and the same being received by the Court and filed on 26 day of February, 1940, by Lucy McMurrey, District Clerk; and the said Indictment is among the original papers in Cause No. 5070, The State of Texas v. O'Neal Massey.
The records in my office do not disclose an Indictment returned

by the Grand Jury of San Jacinto County, Texas, against O'Neal Massey and Jack Cade, jointly.

The Indictment returned by the Grand Jury of San Jacinto County, Texas, against Jack Cade, was received by the court and filed on 26 day of February, 1940, by Lucy McMurrey, District Clerk; and the said Indictment is among the original papers in Cause No. 5071, the State of Texas v. Jack Cade.

Given Under My Hand and Seal of Office, this the 15th day of April, A.D., 1952.

(S.) MRS. IMOGENE H. TRAPP,
Clerk, District Court,
[SEAL] *San Jacinto County, Texas.*

(p. 79)

87-94 INDICTMENT RETURNED BY THE GRAND JURORS OF SAN JACINTO COUNTY

In the Name and by Authority of the State of Texas:

THE GRAND JURORS, for the county of San Jacinto, State aforesaid, duly organized as such at the February Term, A. D. 1940 of the Ninth District Court for said County, upon their oaths in said Court present that O'Neal Massey on or about the 6th day of September, A. D. one thousand nine hundred and thirty-nine and anterior to the presentment of this Indictment, in the County of San Jacinto and State of Texas, did then and there in and upon Dr. M. E. Curtis make an assault; and did then and there, by the said assault and by violence to the said Dr. M. E. Curtis, and by putting the said Dr. M. E. Curtis in fear of life and bodily injury, fraudulently and without the consent of the said Dr. M. E. Curtis, take from the person and possession of him, the said Dr. M. E. Curtis one automobile, the same being the corporeal personal property of the said Dr. M. E. Curtis, with the intent to deprive the said Dr. M. E. Curtis of the value of the same, and to appropriate it to his, the said O'Neal Massey's, own use.

And the Grand Jurors aforesaid do further present that prior to the commission of the aforesaid offense by the said O'Neal Massey, to-wit, on or about the 20th day of January, A. D. 1939, in the Criminal District Court, Harris County, Texas, the said O'Neal Massey was duly and legally convicted in said last named court, of an offense less than capital felony, to-wit, Robbery by Assault, and the conviction therein became final, and being styled The State of Texas vs. O'Neal Massey, and being numbered 46,254, and the said O'Neal Massey was duly tried and convicted upon an indictment then legally pending in said last named court, and of which said court had jurisdiction.

And the Grand Jurors aforesaid do further present that prior to the commission of said Robbery by Assault so charged in the first count of this indictment, and prior to his conviction in January, 1939, the said O'Neal Massey, to-wit, on or about the 12th day of November, 1936, in the Criminal District Court, Harris County, Texas, was duly and legally convicted in said last named court, of an offense less than capital felony, to-wit, felony theft, and the conviction therein became final, and being styled The State of Texas vs. O'Neal Massey, and being numbered 42,628, and the said O'Neal Massey was duly tried and convicted upon an indictment then legally pending in said last named court of Harris County, Texas, and of which said court had jurisdiction against the peace and dignity of the State.

A. R. CRONIN,
[SEAL.] *Foreman of the Grand Jury.*

95 AFFIDAVIT OF W. B. BROWDER

IN THE DISTRICT COURT, 9TH JUDICIAL DISTRICT OF TEXAS

THE STATE OF TEXAS
County of Montgomery:

I, W. B. BROWDER, Judge of the Ninth Judicial District of Texas, do hereby certify the following facts:

I am the duly qualified and acting Judge of the Ninth Judicial District of Texas, which District includes San Jacinto County, Texas. I was acting in such capacity on March 11, 1941, and presided at the trial of O'Neal Massey in the Cause No. 5070 in the District Court of San Jacinto County for the offense of robbery by assault.

At the time Massey was arraigned in open court, the Honorable W. C. McClain, then District Attorney of said District and County, announced that if the defendant desired to plead guilty to the charge against him, the said McClain would recommend that the Court fix the minimum punishment for said offense, to-wit, five years' confinement in the State Penitentiary. Defendant Massey refused to plead guilty and insisted on being tried by jury upon his plea of not guilty.

At the time of such trial Massey was not indicted for a capital offense, was not eligible to make application for suspended sentence, and a jury was not waived. It was not made known to the Court that the defendant was claiming to be insane, and no plea of insanity was interposed. There were no unusual or special circumstances which appeared to require the appointment of counsel.

Therefore no counsel was appointed and Massey proceeded to trial without counsel.

(S.) W. B. BROWDER.

Sworn to and subscribed before me this 1st day of April, 1952.

R. J. GRAY,
Clerk of the District Court of Montgomery County, Texas.

[SEAL.] (S.) By BILLIE JEAN SIMPSON,
Deputy.

96-98 AFFIDAVIT OF W. C. McCLAIN

THE STATE OF TEXAS
County of Montgomery:

BEFORE ME, the undersigned authority, a Notary Public in and for Montgomery County, Texas, on this day personally appeared W. C. McCLAIN, known to me who, being by me first duly sworn, on oath did depose and say:

In the month of March, 1941 I was the duly elected, qualified and acting District Attorney of the Ninth Judicial District of Texas, including San Jacinto County, and I was prosecuting attorney who represented the State of Texas in the trial of Cause No. 5070 in the District Court of San Jacinto County, styled the State of Texas v. O'Neal Massey. In this cause Massey was indicted for the offense of robbery by assault, with averments as to two previous felony convictions.

When Massey was arraigned, I stated to him in open court that if he desired to plead guilty to the indictment I would recommend to the court that Massey be given the minimum sentence of five years in the State Penitentiary. Massey refused to plead guilty, but insisted upon pleading not guilty and upon being tried by jury.

No counsel was appointed by the Court to represent Massey, nor did Massey have counsel of his own choosing.

It was not made known to me at the time of such trial that Massey was claiming to be insane and no plea of insanity was interposed.

(S.) W. C. McCLAIN.

Sworn to and subscribed to before me this 1st day of April, 1952.

(S.) RUTH HAZEL PARSLEY,

[SEAL.] *Notary Public in and for Montgomery County, Texas.*

99 In United States District Court

MEMORANDUM AND ORDER DECLINING EITHER TO AWARD WRIT OF HABEAS CORPUS OR ISSUE AN ORDER TO SHOW CAUSE—Filed Oct 7, 1952

In 1948 Petitioner's Petition for the Writ of Habeas Corpus was fully heard by this Court and Petition denied. This was affirmed by the Court of Appeals on May 9, 1949. See 173 Fed. (2d) 980. On July 14, 1952, a *new* Petition for the Writ of Habeas Corpus was presented by Massey, and the proceedings to be had therein were outlined by Order of July 28, 1952. This Order of July 28, 1952, also called attention to certain other proceedings between such decision by the Court of Appeals and July 14, 1952.

In accordance with the Order of July 28, 1952, the Warden of the Texas State Penitentiary and Massey have filed and lodged with the Clerk copies of documents, etc. upon which each stands in this proceeding. All of these are outlined in the Answer of the Warden on file with the Clerk of the Court. I have considered the record as thus made up, including Findin s of Fact and Conclusions of Law which I made at the trial in 19 8, together with all other records of this Court, and the records o the State Courts mentioned in the Warden's Answer.

As has been stated, I regard the pr ceedings in 1948 and the affirmance by the Court of Appeals on May 9, 1949 (173 Fed. (2d) 980) as settling all questions with respect to Petitioner's right to be released, except one. I regard same as a final determination of such matters under Section 2244, Title 28, of the Code, except on one question. That is that in the former proceed gs in this Court, I found, in accordance with record of his conv tion, that Massey was represented by counsel at his original tri l, but it now appears that he was not.

100 On this question of whether, since he was not represented by counsel at his trial, he is in custody in violation of the Constitution, etc. of the United Stat s, I have examined again all the proceedings in this Court and in the State Courts and have reached the conclusion that his contention that his trial was not in accordance with the Constitution is without merit. Before applying to this Court, he applied to the State Court, and this identical question was passed upon by the Court of Criminal Appeals of Texas on May 28, 1952 (See 249 S. W. (2d) 599). I believe that Court reached the right conclusion under the Law with respect to Petitioner's claim. Apparently no attempt has been made to carry his case to the Supreme Court of the United States.

From what has been said, it follows that I decline to either award the Writ of Habeas Corpus or issue an Order to the Penitentiary Authorities to show cause why such Writ should not be granted.

The Clerk will preserve all papers in his possession until the further Orders of the Court, and will record this Memorandum and Order on the minutes of the Court and furnish each Massey and the Attorney General of Texas with a copy thereof.

Done at Houston, Texas, this October 7, 1952.

(S.) T. M. KENNERLY,
Judge.

191 In United States District Court

MOTION FOR REHEARING—Filed Oct. 22, 1952

To the Honorable Judge of Said Court:

Petitioner respectfully prays for rehearing on the grounds that the Court has erred in denying his petition for the writ of habeas corpus, and that the Court has rendered a decision in conflict with the decision of the U. S. Supreme Court in Palmer v. Ashe — U. S. — Dec. 11, 1951, and with its own decision in CA. No. 2380, 1948, on mental condition.

Wherefore he respectfully moves and prays the Court to set aside its decision in this case and award the writ of habeas corpus.

Respectfully submitted,

(S.) O'NEAL MASSEY,
Box 32, Huntsville, Texas.

A true copy of this pleading was served on Respondent, this 13 day of October, 1952.

102-106 In United States District Court

MEMORANDUM AND ORDER OF COURT, DENYING MASSEY'S PETITION FOR REHEARING—Filed Oct. 22, 1952

On October 7, 1952, this matter was disposed of. Massey now presents a Motion for Rehearing, which, after careful consideration, is denied.

The Clerk will record this Memorandum and Order on the Minutes of the Court, and furnish Massey and the Attorney General of Texas each with a copy.

Done at Houston, Texas, this October 22, 1952.

T. M. KENNERLY,
Judge.

107-116 Clerk's Certificate to foregoing transcript omitted in printing.

117 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14319

O'NEAL MASSEY, APPELLANT

versus

H. E. MOORE, WARDEN, TEXAS STATE PENITENTIARY AT HUNTSVILLE, TEXAS, APPELLEE

Appeal from the United States District Court for the Southern District of Texas.

(June 26, 1953.)

Before HUTCHESON, Chief Judge, and HOLMES, and RIVES, Circuit Judges.

OPINION—Filed June 26, 1953

HUTCHESON, Chief Judge: The petitioner having suffered two previous convictions for other felonies, is serving a compulsory life sentence in the Texas State Penitentiary on a judgment of conviction for the offense of robbery by assault.

118 Convicted on March 11, 1941, he did not appeal. Beginning, however, in March, 1943, he has made persistent and repeated applications in many courts, both state and federal.[1]

When the present petition for *habeas corpus* was presented to him, the district judge, in a memorandum and order reviewing his first proceeding in the federal court, 173 F(2), and the further proceedings taken thereafter by him, stated: "The present petition must, I think, be regarded as a new proceeding but one in which I should consider only one question and that is the question of Massey's not having had counsel at his trial, and that action on this petition should be deferred until the State of Texas and the petitioner shall have filed copies of proceedings, decisions, etc. with respect to his recent petition to the State Court for relief."

Thereafter, the proceedings in the state court having been completed and copies of the documents, etc. upon which petitioner and the state stand in this proceeding having been filed in the federal court, the district judge, confining his determination to the one

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[1] Ex Parte Massey, 191 SW (2) 877; In the Matter of O'Neal Massey, 327 U. S. 770; Massey v. Texas, 329 U. S. 674; In Re: Massey, rehearing denied, 329 U. S. 823; Massey v. Moore, 173 F. (2) 980, cert. denied 338 U. S. 837; Ex Parte Massey, 249 SW (2) 599.

question, whether the trial of petitioner without counsel was a violation of due process, went on to say:

> "On this question of whether, since he was not represented by counsel at his trial, he is in custody in violation of the Constitution, etc. of the United States, I have examined again all the proceedings in this court and in the state courts and have reached the conclusion that his contention that his trial
> 119 was not in accordance with the Constitution is without merit. Before applying to this court, he applied to the State Court, and this identical question was passed upon by the Court of Criminal Appeals of Texas on May 28, 1952 (See 249 SW(2) 599). I believe that court reached the right conclusion under the law with respect to petitioner's claim. Apparently no attempt has been made to carry his case to the Supreme Court of the United States."

Petitioner thereafter moving for a certificate of probable cause and to be allowed to appeal as a poor person, the district judge, upon the basis of the views thus expressed, while allowing petitioner to appeal under Sec. 1915, Title 28 of the Code, declined to issue a certificate of probable cause.

Petitioner appealing from the order denying him the relief applied for, having lodged the record here, the appellee moved to dismiss the appeal because of the absence of a certificate of probable cause as required by Section 2253, Title 28 U. S. C. and of the fact that the State Court of Criminal Appeals has adjudicated appellant's contention adversely to him, and appellant has failed to apply to the Supreme Court of the United States for certiorari.

Countering this motion and in addition addressing himself to the merits of his appeal, appellant is here insisting that the order was erroneously entered and that it must be reversed with directions to allow the writ and order his discharge, and Judge Rives of
120 this court having issued a certificate of probable cause, we deny the motion to dismiss the appeal, and pass to a consideration of its merits.

A careful examination of appellant's contentions in the light of the whole record, including that made on the former appeal to this court, and of the opinions of the Court of Criminal Appeals of the State of Texas, convinces us that the district judge was right in holding that petitioner was not entitled to the writ and in denying his application for it. This is so for the reasons given by the trial judge in the opinions written by him, by this court in 173 Fed.(2), *supra*, and by the Court of Criminal Appeals in Ex Parte Massey, 249 SW(2) 599.

It is quite plain that appellant's stand here is upon his insistence that a defendant, though he has not been adjudged insane, may

stand trial without pleading or otherwise making a showing that he was of unsound mind and, thereafter, on the ground that he was of unsound mind at the time of the trial, by *habeas corpus* collaterally attack and obtain release from custody under, the judgment.

The holding of the Texas Court of Criminal Appeals that a final judgment of conviction cannot be collaterally attacked by *habeas corpus* on a contention of the insanity of the petitioner at the time of his trial is in accord with decisions of other states [2] and of the federal courts.

121 The law standing thus in respect of petitioner's right to collaterally attack the judgment of conviction by raising the question of insanity at the time of trial, and the Sixth Amendment requiring the appointment of counsel not being applicable in state court proceedings, appellant may not by this collateral attack upon the judgment obtain release from custody under it merely by joining with his claim that he had no counsel the claim that he was at the time of trial of unsound mind.

Further, on his former application for relief by *habeas corpus*, the district judge, upon a hearing of the issue whether he was or was not insane at the time he was tried and was, therefore, entitled to relief, determined it against him and denied his petition, and we affirmed, 173 F(2) 980. The issue of his unsoundness of mind, which appellant's petition now tenders as a part of his claim that he should have been afforded counsel at his trial, is not available to him as an independent ground for release in this case. Nor does appellant stand any better on his contention that, though the claim of insanity at the time of trial, being a collateral attack on the judgment, is not an independent ground for release, it is relevant and material upon the issue he now tenders that he did not intelligently waive counsel.

In the first place, there is not, there never was any basis in this case for such an issue since, under Texas law in a case less than capital, it was not necessary for counsel to be appointed for him

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[2] State ex rel Novak v. Utecht (Minn.) 281 NW 775; Mitchell v. State, 179 Miss. 814, 176 So. 743 121 A. L. R. 258; Lee v. State (Ala. Appeals) 44 So. (2) 607; Ex Parte Lee, 27 So.(2) 147; 14 Am. Jur., Criminal Law, Sec. 46; 25 Am. Jur. Habeas Corpus, Sec. 85, Note 12; Annotations on "Remedy and one convicted of crime while insane." 10 A. L. R. 213 and 121 A. L. R. 267, 270; Whelchel v. McDonald, 176 F(2) 260; Dodd v. U. S., 196 F (2) 190.

But the rule is otherwise in the Federal Court if the applicant has been adjudged insane. Ashley v. Pecor, 147 F(2) 320; Hahn v. U. S., 178 F(2) 11; Hollowell v. Hunter, 186 F(2) 873.

unless the issue of his insanity was raised before trial and had to be tried.

122 The real question presented here is not whether petitioner intelligently waived counsel because in a state court in Texas such waiver is not required, but whether, under the undisputed facts, the trial was so unfairly conducted as to amount to a denial of due process.

Appellant does not point to any fact or thing showing that he had a defense and that he was unfairly deprived of it, or that he was otherwise not fairly tried, or even that there was any unfairness in the attitude of prosecutor or court. He rests his whole case upon the proposition raised long after his trial that because, as he now claims, he was then of unsound mind, he could not be tried without counsel.

If his position that he was of unsound mind, in the sense of being insane, is correct, and he had presented it or it had been otherwise timely raised, before or during the trial, he could not have been tried with or without counsel until under the Texas statutes the question of his sanity had been first determined, and he is now barred from collaterally raising an issue which he should have raised on the trial. He is thus in effect endeavoring to retry his case on an issue which should have been raised before or during trial, and it is fundamental that the writ of *habeas corpus* cannot be made to serve this purpose.

As the Court of Criminal Appeals pointed out on the appeal to that court, 249 SW(2), *supra*, there was nothing in connection with the trial to show unfairness in attitude or action on the part of the state or of the court. On the contrary, the record shows that defendant was offered an opportunity to plead guilty and

123 take a sentence of five years but that he refused to do so and insisted upon the case going to trial. The record shows, too, that the defendant did not, either by his own testimony or by that of any other witness deny the crime of which he was charged, and that in the writ of *habeas corpus*, filed in the state court and there denied, with writ of certiorari to the Supreme Court refused, he did not make the ground of his complaint and application either that he was not furnished with counsel or that he was of unsound mind.

It is settled law that the Sixth Amendment does not apply in the states and that a state law providing that it shall not be necessary to assign counsel in cases short of capital is not in violation of the Fourteenth Amendment or of any other conception of due process.

It is further established that while in particular cases the Supreme Court has asserted the right to determine on the undisputed facts whether or not a state trial has violated the due process clause of the Fourteenth Amendment, the fact that, unless the violation of

the federal constitution is clear and plain, the action of the federal court would be an interference with state court proceedings, makes it imperative that something in the proceedings be pointed to as a denial of that process.[3]

Upon the facts of this case, as this record presents them, included therein, of course, the verdict of the jury and the judgment
124 of the court, it appears; that petitioner is guilty of the offense of which he was charged, and, having been found guilty, became automatically subject to a sentence of imprisonment for life; that he was put to trial and tried, not oppressively or vindictively, and not until after he had been offered an opportunity to plead guilty and take a five year sentence; that he refused to do this and insisted on going to trial on his plea of not guilty; and that, as the legal and preemptory result of his conviction he was given the sentence which the statute compels.[4]

Upon this record, appellant may not attack the life sentence again, this time on the ground that he was mentally incompetent to stand trial. Under the procedure prevailing here and generally elsewhere, this is a collateral attack upon the judgment. If allowed, it would in effect permit a retrial in every criminal case of issues, which had been settled by the trial and judgment, not on the ground that anything was done by the state or the court which prevented appellant from making his defense, but on the wholly untenable, because collateral, attack upon the judgment, that he was of unsound mind at the trial and it was contrary to due process to put him to trial if he was in that state of mind without according him counsel.

In a long series of cases, beginning with *Parsons* v. *State*, 218 SW(2) 202, and ending in *Johnson* v. *State*, 251 SW(2) 739, including therein the opinion in the Massey case, 249 SW(2),
125 *supra*, the Court of Criminal Appeals has dealt with the general question involved here, the effect upon a conviction in a less than capital case of the failure of the defendant to have the assistance of counsel. With an earnest purpose to apply the law as the Supreme Court of the United States has from time to time declared it, that court, canvassing the facts in each of the cases dealt with and hewing to the established line, that the appointment of counsel in a criminal case in the state court is not a legal

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[3] Betts v. Brady, 316 U. S. 455; Uveges v. Pennsylvania, 335 U. S. 437; Gibbs v. Burke, 337 U. S. 773; Gallegos v. Nebraska, 342 U. S. 55; Palmer v. Ashe, 342 U. S. 134; Commonwealth v. Burke, 91 Atl. at 915; and Johnson v. State, 251 SW(2) 739.

[4] Art. 63, Vernon's Penal Code of the State of Texas; Haro v. State, 105 SW(2) 1093; Ex Parte Massey, 191 SE(2) 978, writ of certiorari denied, 329 U. S. 674.

right, and that each case must stand on its own facts and must be determined by a showing of whether or not due process has been violated, has deliberately, carefully, and, we think, correctly adjudicated each case, including Massey's, that has come before it.

Giving the fullest effect to petitioner's claims of a denial of due process, all that can be made out of them is that he should have had counsel. He did not request the appointment of counsel. He did not complain because counsel was not appointed. He does not now show that anything was done to him unfairly or unjustly, which, if he had had counsel he could have been protected from. He does not even claim or make any showing, if he does claim, that if he had had counsel, he would have acted differently, in respect to accepting the offer to take a plea of a five year sentence, than he did act without counsel. But if it be assumed that he is in effect complaining that if he had had the assistance of counsel, he would have been advised by counsel to plead guilty and take a five year sentence rather than run a chance of a third conviction with life imprisonment, and would have taken the advice, this would not avail him. For if unless it is to be held in every case where
126 hindsight shows that the course taken by defendant was not the wise one, that the failure to have the assistance of counsel converts what would otherwise be an error of judgment into a denial of due process, no violation of due process is presented here.

We are in no doubt that but for the fact that in this case the defendant was a third offender and that, looking with hindsight at the result of his action in not accepting a plea, he would have been better advised to accept it, there would be no possible basis for a claim that anything occurred in the trial which constituted a violation of d[illegible] We cannot agree that this fact furnishes the basis for a finding that he was denied due process. On the contrary, we agree with the opinion of the Court of Criminal Appeals of Texas that it did not.

The judgment was right. It is AFFIRMED.

RIVES, Circuit Judge, dissenting:

Whatever might have been the effect of any one circumstance standing alone, it seems to me that, when the fact that petitioner was not offered counsel for his defense is coupled with the fact that he was probably insane at the time of trial, and with the further fact that his mental incapacity, if not brought to the attention of the state court, was known to the state penitentiary officials who removed him from the prison psychopathic ward and delivered him for trial, the conclusion is inescapable that the petitioner has been denied due process of law.

127 While the district judge decided that petitioner's contention was without merit, he expressed some doubt also as to whether the failure to seek review of the last State court decision in the Supreme Court of the United States prevented the district court from granting the writ. That question, it seems to me, should receive first consideration.

The application to the federal district court for *habeas corpus* in behalf of a State prisoner should be denied unless it is made to appear (1) that all State remedies, including a denial of review of the federal questions involved by the Supreme Court of the United States, had been exhausted; or (2) that there was no adequate and effective remedy available in the State courts. 28 U. S. C. A. 2254; *Darr vs. Burford*, 339 U. S. 200; *Brown vs. Allen*, 344 U. S. 443; *Bacom vs. Sullivan*, 181 F. 2d 177; same case, 194 F. 2d. 166. Repetitious applications to state courts are not required. *Brown vs. Allen, supra; Bacom vs. Sullivan, supra.*

As to prerequisite (1), *supra*, it does appear that one petition for *habeas corpus* filed in the District Court of Walker County, Texas at its May term, 1945, has been prosecuted through the Court of Criminal Appeals of Texas (191 S. W. 2d. 877), with review denied by the Supreme Court of the United States (329 U. S. 674). The principal grounds for that petition, however, were that the jury failed to assess a penalty in the verdict finding petitioner guilty, and that the sentence entered on the court record was confinement in the State Penitentiary "for a term of —— years".

128 After a hearing, the State court entered judgment *nunc pro tunc* providing that petitioner be punished by confinement in the State Penitentiary for life. That application itself did not raise the question of petitioner's lack of counsel, but in seeking to disqualify the Judge of the District Court of San Jacinto County from hearing the application, petitioner used this language:

> "That (at) the time of the trial of cause No. 5070, styled The State of Texas vs O'Neal Massey, by the 9th Judicial District Court of San Jacinto County, Texas, the relator was confined to the Texas State Penitentiary Psychopathic Ward, Huntsville, State Prison as an insane patient.
>
> "That relator was released from said insane ward, to the San Jacinto County Officials to stand trial in said cause.
>
> "That when said cause was called for trial on March 11th, a.d. 1941, the judge of said court was properly informed that the relator was being placed on trial in said cause in an insane state of mind, without benefit of counsel.
>
> "That through prejudice of the presiding judge, Honorable W. B. Browder, the trial was ordered to proceed without recognizing the insane condition of the relator, and through prejudice, said Judge Honorable W. B. Browder refused to appoint coun-

sel for relator, therefore depriving the relator of his constitutional rights."

The Supreme Court denied review on October 21, 1946 (329 U. S. 674). On December 4, 1946, the Court of Criminal Appeals
129 of Texas considered another petition for *habeas corpus* in which it was alleged,

"that at his first trial on March 11, 1941, and also on the hearing on July 26, 1945, at which time the second judgment and sentence was rendered against him, the relator was unable to defend himself and that said court deprived him of the aid and assistance of counsel for defense, in violation of the due process of the law clause of the 14th Amendment of said Constitution. That he did not by word or action at either trial waive the assistance of counsel for his defense."

In denying that petition, the Court of Criminal Appeals, through its Presiding Judge, entered following order:

"Application for writ of habeas corpus is refused. The same Matters here presented were passed upon by this court in Ex parte Massey, No. 23,212, reported in S. W. 2d. series, at page 877, Vol. 191, this Decr. 4, 1946."

The Texas Court of Criminal Appeals has thus construed its former decision as having passed upon the petitioner's claim that the denial of counsel deprived him of due process. If so, then petitioner has exhausted his state remedies.

Since that is debatable, however, let us consider the alternative prerequisite (2), that is, whether petitioner had an adequate and effective remedy available in the State courts. Beginning
130 in March, 1943, there have been persistent and repeated applications by appellant in many courts, both state and federal. Among the reported decisions are: Ex parte Massey, 191 S. W. 2d. 877; *Massey vs. Texas*, 329 U. S. 674; *Massey vs. Moore*, 173 F. 2d. 980, certiorari denied, 338 U. S. 837; In the Matter of O'Neal Massey, 327 U. S. 770, motion for leave to file petition for rehearing denied, 329 U. S. 823; Ex parte Massey, 249 S. W. 2d. 599. In most of these applications, the petitioner has sought a hearing on his claim that he was mentally incapable of defending himself and that to try him without counsel amounted to a denial of due process of law. To this date, he has never been able to obtain a hearing in which *both* his trial without counsel and his alleged mental incapacity were considered.

The judgment of this Court in 173 F. 2d. 980 was based upon the assumption that petitioner had been represented by counsel at

his trial, because the records of the court in which he was convicted recited that petitioner "appeared in person in open court, his counsel also being present". It is now shown by the certificate of the trial judge (28 U.S.C.A. 2245) and also by the certificate of the prosecuting attorney that the record of the jdugment is not correct, and that petitioner was not represented by counsel at his trial. Affidavits of the judge presiding and the district attorney prosecuting at the trial are quoted in full in the opinion of the Court of Criminal Appeals of Texas in 249 S. W. 2d. at 599 and 600.

In his very first petition for *habeas corpus*, a petition presented to the Judge of the District Court of Montgomery County, Texas, on or about March 22, 1943, complaining of his conviction
131 on March 11, 1941 in San Jacinto County, the petitioner made the following allegations:

> "Relator would further show your Honor that the District Court of San Jacinto County, Texas, was without jurisdiction of the offense charged in the indictment; that the venue was not properly laid for the reason that the offense, if any, did not occur in San Jacinto County. Relator would further show your Honor that the relator was without counsel at the time of his trial and was insane; that he was ignorant of his legal rights and interposed no defense whatever, as the record reflects, and that the defendant is still insane."

The Texas Court held,

> "that relator's application for writ of habeas corpus should be dismissed for the reasons, to-wit; That the judgment and sentence of the 9th District Court of San Jacinto County, Texas, in cause Number 5070, styled State of Texas v. O'Neal Massey, has become final, and the defendant not having raised the questions of venue or of insanity, as matters of defense, upon the trial of said cause, he has therefore waived the same, and said judgment and sentence is final against him, the said O'Neal Massey.
>
> "That on the question of sanity of the defendant, O'Neal Massey, after conviction, this proceeding is not properly brought according to law in such cases."

132 Evidently that same view was entertained by the Court of Criminal Appeals of Texas in its last consideration of the case, Ex parte Massey, 249 S. W. 2d. 599. That Court then had before it considerable evidence as to the petitioner's alleged insanity certified by the judge of the District Court of Walker County, Texas, under the provisions of Art. 119, C. C. P., as amended, Vernons Ann. C. C. P. Art. 119, but the Court of Criminal

Appeals failed to discuss any of such evidence and apparently declined to consider it, stating:

> "In the recent case of Ex Parte McCune, Tex. Cr. App., 246 S. W. 2d. 171, we had occasion to adhere to our prior holdings that the common-law writ of coram nobis has no application in this state and that the right to re-open and re-examine a prior final conviction does not exist in this state. This rule is here applicable as to relator's contention that he was insane at the time of trial." (249 S. W. 2d. 601).

In earlier parts of its opinion that Court had noted,

> "that the necessity for furnishing counsel to an accused upon trial for a crime less than capital depends, in a State court, upon the facts in each case, in the determination of which there must be taken into consideration the gravity of the crime, the age and education of the accused, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged, and the possible defense thereto." (249 S. W. 2d. 601).

It may be significant that while the Texas Court said that "the age and education of the accused" should be taken into
133 consideration, it made no mention of his alleged mental incapacity due to disease or insanity. Further, the Texas Court said:

> "No stronger evidence of relator's ability to represent himself upon the trial of his case can be offered than his conduct and examination of the witnesses upon the instant trial." (249 S. W. 2d. 601).

"The instant trial" then being considered took place on April 4, 1952, more than eleven years after the petitioner had been tried and convicted on March 11, 1941. It is, therefore, clear that the Texas Court considered petitioner's mental capacity as being the same over this long period of years and declined to take note of the evidence of his alleged insanity at the time of his trial and conviction.

It is fair to conclude that petitioner had either exhausted his State remedies or that the State courts afforded no adequate and effective remedy for petitioner's claim that while mentally incapable of defending himself he was tried without counsel, or that both of such prerequisites to the application to the federal district court had been met.

Coming to a consideration of the merits of petitioner's contention, it may be noted that the nature of the evidence of petitioner's al-

leged insanity at the time of his trial is fairly reflected by the careful findings of fact of the United States District Judge on the hearings before him in June 1948:

134 "He claims that he was of unsound mind at the time of such San Jacinto County Trial. The testimony of Joe Byrd, who was some time before and some time after March 11, 1941, Assistant Warden of the Texas State Penitentiary and who is now Chief Transfer Agent of such Penitentiary, is most significant. Respondent not only did not attempt to show that Byrd's testimony was untrue, but did not cross examine him. The meager records produced from the psychopathic ward of the prison, where Petitioner was confined, tend to corroborate, rather than dispute, Byrd's testimony. It is clear that Petitioner was at times of unsound mind and was confined in the psychopathic ward of the penitentiary. He was taken from such psychopathic ward, delivered to the Sheriff of San Jacinto County, and carried before the San Jacinto County Court, and on March 11, 1941, tried and sentenced as stated above. After such trial and sentence, while in the San Jacinto County jail, he mutilated himself by cutting his wrists, and was in that condition when returned to the penitentiary, and to the psychopathic ward.

"I find petitioner to have been at times and from time to time of unsound mind around March 11, 1941, the date of his trial in the District Court of San Jacinto County, and for several months previous thereto, and several months subsequent thereto. What his condition was on the day and at the time of the trial is not clear. I think he is now sane, but rather queer."

135 In the hearing certified to the Court of Criminal Appeals of Texas and which appears in the record before us, Joe Byrd further testified on his examination by the petitioner:

"Q. You testified at a Federal habeas corpus hearing in 1948, that about January, 1941, until some time in August, I was more or less of unsound mind, however, you stated at times I appeared to be normal; Captain Byrd, I would like to ask you, to the best of your memory, at times when I appeared to be normal, do you believe I was fully normal?

"A. No, I don't. I didn't think you have very much sense.

"Q. Now, about Marel 7, 1941, the record shows, you and Mr. T. W. Arnold released me from the State Insane Ward to the Sheriff of San Jacinto County, Texas, is that correct?

"A. Now, let me think a minute. Me and Arnold went over there and got you out of the psychopathic ward, but I don't

remember when it was, and turned you over to the law in San Jacinto County. I don't remember the date.

"Q. Do you recall whether or not you told these officers from San Jacinto County that I was being released to them from the insane ward?

"A. Oh, I don't remember about that. I might have and it seems like I did."

The Court of Criminal Appeals of Texas placed great emphasis on "the fact that the court, as well as the representative of the state, offered relator a term of five years in the penitentiary upon his plea of guilty". (249 S. W. 2d. at 600.) Every person
136 accused of a felony has a right to a trial before a jury of his peers conducted according to due process of law. It seems to me incredibly wrong that, solely because he insisted on exercising that basic and blood-bought right, this petitioner has now been imprisoned for twelve instead of for five years, and must continue to suffer imprisonment for the rest of his life.

At the time of the robbery by assault for which the petitioner was convicted, he was an escaping convict. How many were involved in the escape does not appear, but at least two of the convicts committed this robbery. The record contained the following stipulation:

"AGREEMENT

"DICTATED BY MR. GRESHAM:

"It is agreed by and between the Petitioner and the Respondent that one Jack Cade was also indicted by the Grand Jury of San Jacinto County, for the offense of Robbery by Assault upon the same facts and growing out of the same transaction for which this Petitioner was indicted. At the time Cade was indicted he had at least two prior felony convictions in this State. Cade was not indicted as an habitual offender. Upon his trial on or about March 10, 1941, in the District Court of San Jacinto County, Cade plead guilty to the offense of Robbery by Assault and upon the recommendation of the District Attorney, received the minimum sentence of five years confinement in the penitentiary."

137 Assuming petitioner actually to be guilty, it yet remains true that if he had been represented by counsel and properly advised, he, like Cade, might have pleaded guilty, and, if so, his five year sentence would have expired seven years ago.

Assuming petitioner actually to be not guilty, he should not be penalized for refusing to plead guilty even in the face of such an attractive offer.

No record of the evidence taken at petitioner's original trial and

conviction has been made available to us. It has been the petitioner's contention, as appears from previous petitions for *habeas corpus*,[1] and from his questions to the witnesses in the last hearing, that upon his trial he conducted no defense of himself and asked no questions, and, further, that there was no substantial evidence to connect him with the crime. Whether he claims now to be innocent does not appear. He did insist upon his trial on entering a plea of not guilty.

Petitioner's contention that, if he had been adequately represented by counsel, he might have been acquitted is corroborated to some extent by the testimony of the victim of the alleged assault to rob, Dr. M. E. Curtis:

"Q. Did you later on testify in the District Court of San Jacinto County, Texas, against the boys who took your automobile?

"A. Yes, I appeared in court.

138 "Q. Against the boy that they claimed took your car?

"A. I didn't recognize the men at all as I never saw them. I never could see them as they kept their faces out of my sight.

"Q. At the trial there then, did you identify me as one of the persons who took your car?

"A. No.

Q. Did you ever, at the trial, state whether or not that actually happened to you in San Jacinto County?

"A. I think I gave the same testimony that I have given here.

"Q. Do you recognize me as being one of the defendants at that trial, do you not?

"A. No, I don't. It has been so long and I didn't pay very much attention to the prisoners at all. I just went over there and gave my testimony and got up.

"Q. Do you recall whether or not you were cross examined?

"A. I don't think so.

"Q. The prisoner, whom they were trying, did he ask any questions at all?

"A. I don't think. I think probably the lawyers were the only ones to ask me any questions.

"Q. Just the District Attorney?

"A. Yes, I guess so.

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[1] Including his first petition filed March 22, 1943, in which he alleged: "the relator was without counsel at the time of his trial and was insane; that he was ignorant of his legal rights and interposed no defense whatever, as the record reflects, and that the defendant is still insane."

"Q. Were you present when other witnesses testified in the same case?

"A. I don't know whether I was or not. As soon as I got through and as soon as I got excused I came on back to the Eastham farm.

139 The petitioner questioned the Sheriff of San Jacinto County:

"Q. Did you hear me cross examine any witnesses in that court?

"A. I don't recall. But I remember you represented yourself.

"Q. You don't remember me saying anything?

"A. I can't remember what you said. I just remember you represented yourself."

There was no further testimony as to whether petitioner cross examined any witnesses, offered any testimony, justified in his own behalf, or in any way conducted a rational defense of himself.

Upon the present record, it is obvious that the result would have been different, a five year sentence instead of life, if petitioner had pleaded guilty. Whether the result would have been different if petitioner had been represented by counsel on his trial, having pleaded not guilty, we cannot say. Other than the jury's verdict and the court's judgment, both attacked by the petition, there is no evidence in the present record to show that petitioner was guilty of the offense of which he was charged.

Considering the necessity of maintaining public order, Texas has held judgments of conviction to be final and conclusive, not subject to be reopened for trial of the issue of insanity at the time of
140 trial. This acute form of the perpetual struggle between order and liberty has been decided by Texas in favor of order.

On the side of liberty, however, it is obvious that insanity may disable a person from making a rational defense. 14 Am. Jur., Criminal Law, Sec. 44. It seems inconsistent to hold that petitioner is foreclosed from raising his mental incapacity to defend himself, because he did not enter a proper plea of insanity. His very incapacity would have disabled him from so pleading. This apparent dilemma may be solved by the appointment of counsel, in cases where the State knows of the defendant's doubtful mentality. It is true that an insane man can have no contractual agent, but it is equally true that a person *non compos mentis*, or so suspected, may have an attorney appointed by law. *Mitchell vs. State*, 179 Miss. 814, 176 So. 743, 121 A.L.R. 258, 262. It may be that appointment of counsel is not required in every case even of a grave criminal offense to foreclose the issue of insanity at the time of trial. When a crime other than a capital offense is involved, each case depends upon its own facts. *Betts vs. Brady*, 316 U. S. 455, 462. Taking into consideration the peculiar circumstances in each case as to the

gravity of the offense, its complicated nature, the possible defense thereto or mitigation thereof the conduct of the court or prosecuting officials, the United States Supreme Court "decisions have been that where the ignorance, youth, *or other incapacity* of the defendant made a trial without counsel unfair, the defendant is deprived of his liberty contrary to the Fourteenth Amendment". (Emphasis supplied). *Gibbs vs. Burke*, 337 U. S. 773, 780. See also *Rice vs. Olson*, 324 U. S. 786; *Bute vs. Illinois*, 333 U. S. 640, 677;
141 *Uveges vs. Pennsylvania*, 335 U. S. 437, 441; *Gibbs vs. Burke*, *supra*; *Quicksall vs. Michigan*, 339 U. S. 660, 666; *Palmer vs. Ashe*, 342 U. S. 134, 135. As said in the last cited case:

> "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires States to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

Those decisions of the Supreme Court of the United States are binding alike upon the state courts and upon this court. *Johnson vs. State*, 251 S. W. 2d. 739. It seems clear to me that insanity, just as any other incapacity of the defendant, may make a trial without counsel unfair and lacking in due process.

The special facts and circumstances of this case have already been sufficiently related. In gravity the offense ranked only one degree below a capital offense as is indicated by petitioner's sentence to life imprisonment. The offense was complicated by the Texas habitual criminal law which imposed the unusual risk of life imprisonment if found guilty by the jury's verdict, while a sentence of five years was offered for a plea of guilty. The victim of the robbery, though unable to identify his assailants, was not cross-examined on petitioner's trial, and the evidence is unsatisfactory as to whether the petitioner presented any rational defense. He failed to appeal and for several years failed to question the sufficiency of the verdict and sentence in not prescribing the term of his confinement.
142 Before his trial, the petitioner was already in the custody of the State. He was known by the penitentiary authorities to be insane at times, and when he appeared to be normal he did not have "very much sense". He was removed from the psychopathic ward for trial. Whether the facts tending to show his mental incapacity to defend himself were reported by the officials of the state penitentiary is not clear. Joe Byrd testified that, "I might have and it seems like I did" tell the officers from San Jacinto County that petitioner was being released to them from the psychopathic ward. The facts were in possession of the state penitentiary officials, they may have been related to the San Jacinto County officials, and they should have been made known to the trial judge and to the

State's attorney. Under such circumstances to require the petitioner without counsel to make the grave choice between a five year sentence and the risk of life imprisonment, and then upon his plea of not guilty to require him to be tried without counsel seems to me so apt to result in injustice as to be fundamentally unfair and a denial of due process of law.[2]

143 That conclusion is required, I think, from a consideration of the facts and circumstances of the case as revealed by the present record alone. Admittedly, the petitioner was tried and sentenced to life imprisonment without benefit of counsel and counsel was not offered to him. Admittedly, also, his doubtful mental condition was known to the State penitentiary officials; they took him from the prison psychopathic ward and delivered him for trial. The petitioner has made out at least a *prima facie* case that he was suffering from such mental incapacity as to make his trial without counsel unfair and hence his resulting life imprisonment a deprivation of his liberty contrary to the Fourteenth Amendment. It seems to me that, if the respondent has additional evidence he should produce the same on a hearing before the district judge pursuant to issuance of the writ or of an order to show cause.

I respectfully dissent.

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[2]Appellant is not now represented by counsel, and I have been unable to find any case directly in point. The following decisions illustrate the care with which federal courts should investigate a claim that a person has been convicted while insane and without counsel: Ashley vs. Pescor, Warden (8th Cir.), 147 F. 2d. 318; Kuczynski vs. United States (7th Cir.), 149 F. 2d. 478; Brewer vs. Hunter, Warden (10th Cir.), 163 F. 2d. 341; Moss vs. Hunter (10th Cir.), 167 F. 2d. 683; cf. Phyle vs. Duffy, 334 U. S. 431; Smith vs. Baldi, 344 U. S. 561. Among other decisions see Jablonski vs. People (Ill. App.), 71 N. E. 2d. 361; Evans vs. United States, (Mun. Ct. App. D. C.), 83 Atl. 2d. 876. In Vonderschmidt vs. State (Ind.), 81 N. E. 2d. 782, the Fifth headnote accurately states the holding of the Supreme Court of Indiana:

"5.—* * Judgment of conviction of robbery by violence based on a plea of guilty entered without advice of counsel at a time when defendant was confused as a result of prolonged intoxication should be set aside on writ of error coram nobis and defendant permitted to withdraw plea and enter plea of not guilty, since acceptance of plea of guilty under the circumstances amounted to a denial of defendant's constitutional rights, though defendant, before entering plea, was advised of his constitutional rights and waived right to assistance of counsel. * *"

IN UNITED STATES COURT OF APPEALS

144-153 ~~In The United States District Court~~

No. 14319

O'NEAL MASSEY

versus

H. E. MOORE, WARDEN, TEXAS STATE PENITENTIARY, AT HUNTSVILLE, TEXAS

JUDGMENT—June 26th, 1953.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

154 ~~In The United States District Court~~

IN UNITED STATES COURT OF APPEALS

[Title omitted.]

ORDER DENYING REHEARING—September 10th, 1953.

It is ordered by the Court that the Petition for Rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissents."

155 Clerk's Certificate to foregoing transcript omitted in printing.

156 SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1953

No. 290 Misc.

[Title omitted.]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORDER GRANTING CERTIORARI—June 7, 1954

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the

same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket and placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 309506